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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 730

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, BROTHERHOOD OF RAILROAD TRAINMEN, and SWITCHMEN'S UNION OF NORTH AMERICA, *Petitioners,*

v.

THE BALTIMORE & OHIO RAILROAD, *et al., Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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v.

THE BALTIMORE & OHIO RAILROAD COMPANY, THE BALTIMORE AND OHIO CHICAGO TERMINAL R.R. CO., THE NEW YORK CENTRAL RAILROAD COMPANY, INDIANA HARBOR BELT RAILROAD, THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, CHICAGO AND NORTH WESTERN RAILWAY COMPANY, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC R.R., ILLINOIS CENTRAL RAILROAD, THE BELT RAILWAY COMPANY OF CHICAGO, NORTHERN PACIFIC RAILWAY, SOUTHERN PACIFIC COMPANY, UNION PACIFIC RAILROAD, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, GULF MOBILE AND OHIO R.R.; EASTERN CARRIERS' CONFERENCE COMMITTEE; GUY W. KNIGHT, individually and as Chairman of EASTERN CARRIERS' CONFERENCE COMMITTEE; W. S. MACGILL, L. B. FEE, J. J. GAHERIN, R. L. HARVY, R. W. PECKARD, and G. C. WHITE, individually and as members of EASTERN CARRIERS' CONFERENCE COMMITTEE; WESTERN CARRIERS' CONFERENCE COMMITTEE; J. E. WOLFE, individually and as Chairman of WESTERN CARRIERS' CONFERENCE COMMITTEE; L. D. COMER, E. H. HALIMANN, A. D. HANSON, E. B. HERDMAN, G. E. MALLERY, and K. K. SCHOMP, individually and as members of WESTERN CARRIERS' CONFERENCE COMMITTEE; SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEE; B. B. BRYANT, individually and as Chairman of SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEE; W. S. BAKER, W. L. BURNER, JR., individually and as members of SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railway Conductors and Brakemen, Brotherhood of Railroad Trainmen, and Switchmen's Union of North America, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on November 28, 1962, Court of Appeals No. 13876.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, *infra*) has not yet been officially reported. The District Court did not render any opinion; its final order appears at P.A. 116-118,[1] and is appended hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on November 28, 1962, and is appended hereto as Appendix C. The petitioners' petition for rehearing was denied on December 19, 1962. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a Court of Appeals denies a plaintiff-appellant due process of law in violation of the Fifth Amendment to the Constitution of the United States where, in affirming a judgment of a District Court sustaining a motion to dismiss a complaint, the Court

[1] P.A. denotes the Appendix to Brief for Plaintiffs-Appellants in this case, below; D.A. denotes the Appendix of Defendants-Appellees in this case, below; No. 13855 P.A. denotes the Appendix to Brief for Plaintiffs-Appellees in No. 13855 in the court below; No. 13855 D.A. denotes the Appendix to Brief for Defendants-Appellants in No. 13855 in the court below.

of Appeals bases its affirmance on its own version of facts not stated in the complaint nor put in issue through any pleading but which the Court of Appeals resolves from disputed evidence introduced in the District Court in a hearing on an injunction pending appeal held after the motion to dismiss was sustained, without plaintiff-appellant having been afforded any opportunity to offer evidence in support of the merits of its complaint.

2. Whether a carrier subject to the Railway Labor Act may abrogate large numbers of rules governing matters of job content, crew consist, seniority, delineation of craft or class, place and manner of work, which have historically been the subject of collective bargaining in the railway industry, and unilaterally establish that henceforth there shall be no rules governing these matters but that from day to day the carrier, without notice to, or discussion with, the representatives of its employees, will determine these matters in its uncontrolled discretion.

3. Whether a carrier subject to the Railway Labor Act is required by that statute to deal with representatives of its employees and follow the procedures of that Act about changes in the carrier's assignment of work, job content, crew consist, place of work, length of runs, merging of crafts or classes, abolition of crafts or classes, merger of seniority lists and abolition of jobs.

4. Whether a carrier subject to the Railway Labor Act may lawfully abolish craft or class distinctions which that statute accepts as the basis for the machinery for collective bargaining and grievance adjustments established therein.

STATUTES INVOLVED

The pertinent provisions of the Railway Labor Act, appear in Appendix D, *infra*.

STATEMENT

The petitioners instituted this action by filing in the district court on July 26, 1962 their complaint for injunction and a declaratory judgment in which they sought to declare unlawful a "Promulgation of Revision in Work Rules" issued by the respondents on July 17, 1962. The promulgation attacked by the complaint stated that the rates of pay, rules and working conditions of the respondents' employees represented by the petitioners in collective bargaining would be changed as provided in the promulgation effective August 16, 1962, and stating that numerous rules governing large areas of what theretofore had been subjects of collective bargaining would be rescinded and such matters determined from day to day by management discretion. The complaint also sought to enjoin the respondents from putting the Promulgation in effect, on the ground that it was in violation of the Railway Labor Act (P.A. 1-49). This complaint was held by the district court to state a good cause of action (P.A. 127). The respondents elected not to defend the legality of their July 17, 1962 promulgation for they withdrew their promulgation and in the court room on August 6, 1962, served on the petitioners a second promulgation containing different terms, likewise to be effective August 16, 1962 (P.A. 116-17, No. 13855 D.A. 100, 104-106). The petitioners thereupon amended their complaint to seek declaratory and injunctive relief against the second promulgation as like-

wise in violation of the Railway Labor Act (P.A. 53-78, 130, 164).

The petitioners are unincorporated labor organizations which are the duly authorized and accredited representatives for the purposes of the Railway Labor Act of crafts or classes of employees constituting the so-called "operating" employees, such as engineers, firemen, conductors, brakemen and switchmen employed by the class of respondent railroads (P.A. 2).

All the railroads parties to the second promulgation are sued as a class, with the named respondents sued individually and as representatives of the class (P.A. 3, 53). Both the first promulgation and the second promulgation were issued on behalf of more than 200 railroads, including all but one of the major railroads (P.A. 3, 41-49, 53, 71-78). Each of the members of the class is a "carrier" as defined in section 1 of the Railway Labor Act and is subject to the provisions of that Act (P.A. 3).

The second promulgation is attached to the amendments to the complaint (P.A. 53-54, 57-78). The document is entitled as follows (P.A. 60):

> "Promulgation of Revisions in Work Rules
>
> "by each of the railroads represented by the Eastern, Western and Southeastern Carriers' Conference Committees, listed in Exhibits A, B, and C, attached hereto and made a part hereof, applicable to their operating employees, as shown and described in said exhibits, represented by:
>
> Brotherhood of Locomotive Engineers
> Brotherhood of Locomotive Firemen & Enginemen
> Order of Railway Conductors and Brakemen
> Brotherhood of Railroad Trainmen
> Switchmen's Union of North America"

The promulgation then recites (P.A. 60):

> "The following rules, rules changes and rates of pay will become effective at 12:01 a.m., August 16, 1962."

The promulgation is divided into three main headings: "I—Use of Firemen (Helpers) on Other Than Steam Power" (P.A. 61); "II—Basis of Pay and Assignment of Employees" (P.A. 61); "III—Consist of Crews" (P.A. 68). Except for the provisions setting forth the basis of pay (P.A. 61-65), the other provisions of the second promulgation consist for the most part of statements that management shall have an unrestricted right under any and all circumstances to determine all other aspects of the employee relationship and that all previous commitments impinging on such unrestricted power of management are abrogated. (P.A. 61, 65-70) For instance, with respect to the use of firemen on other than steam power, the second promulgation reads (P.A. 61):

> "1. Management has the unrestricted right, under all circumstances, to determine when and if a firemen (helper) shall be used on other than steam power in all classes of freight service (including all mixed, miscellaneous and unclassified services) and in all classes of yard service (including all transfer, belt line and miscellaneous services to which mileage rates do not apply).
>
> "2. All agreements, rules, regulations, interpretations and practices, however established, are eliminated and cancelled to the extent that they conflict in any respect with the provisions of paragraph 1 of this rule."

With respect to "Road Train and Engine Service Assignments" the second promulgation provides (P.A. 65):

"1. The carrier has the right to establish, move, consolidate and abolish crew terminals, to merge and consolidate seniority districts and to establish interdivisional, interseniority district, intradivisional and intraseniority district runs * * *"

With respect to merging and consolidating seniority districts, all previous rules, regulations and practices, however, established, are abrogated if inconsistent with unrestricted management power subject only to the one limitation that the carrier "shall distribute the mileage ratably as between employees from the seniority district affected (P.A. 66). With respect to establishing a new run involving both the establishment of a new home terminal and operation through an established crew terminal, contrary to previous commitments, the second promulgation does provide for notice to the representative of the employees and opportunity for negotiation, but provides if no agreement is reached within 30 days, unless the representative of the employees invokes arbitration, the carrier may make the change free of any restriction (P.A. 66).

With respect to the "Combination of Road and Yard Service" the promulgation provides in what is designated as Rule II C that management may assign road crews to do yard work, may assign yard crews to do road work (P.A. 67), and that "Management has the exclusive right to designate and change switching limits, and to establish and abolish yard and hostling service and yard and hostling service assignments" (P.A. 68). It is announced that (P.A. 68):

"All agreements, rules, regulations, interpretations and practices, however established, are eliminated and canceled to the extent that they conflict

in any respect with the foregoing provisions of this rule II-C."

The second promulgation contains lists of subjects as to which management is asserting its unrestricted authority, as for instance the following:

> "Management has the unrestricted right, under any and all circumstances, to determine when and if trainmen (assistant conductors, ticket collectors, baggagemen, brakemen and flagmen) shall be used in each crew * * * and if used the number and classification of the employees who will be so used; and when and if brakemen or helpers shall be used * * * and if used, the number and classification of employees who will be so used" (P.A. 68).
>
> "Management also has the unrestricted right, under all circumstances, to determine when and if more than one conductor shall be used" (P.A. 68).
>
> "Management has the unrestricted right, under all circumstances, to determine when and if engine, train and yard service employees shall be used on motor cars and self-propelled roadway and shop equipment and machines" (P.A. 69).

The amended complaint alleges that with respect to all the subjects dealt with in the second promulgation that the petitioners have for many years had collective bargaining agreements with the respondent carriers and the carriers represented by the respondents containing numerous and detailed rules (P.A. 5●). The amended complaint alleges that the carriers by announcing that effective August 16, 1962 there shall be no rule concerning broad subjects of traditional collective bargaining between petitioners and respondents violated Section 2, First of the Railway Labor Act (P.A. 55).

The complaint as amended prays for a declaratory judgment declaring the first and second promulgations invalid and in violation of the Railway Labor Act and that putting the contents of either of them into effect would be in violation of the Railway Labor Act (P.A. 55) and a permanent injunction against putting into effect the first and second promulgations (P.A. 55-56).

The only pleadings by respondents to either the original complaint or the amended complaint were motions made in open court to dismiss (P.A. 120, 164). No hearing to receive evidence was held on either the original complaint or the amended complaint. For the purpose of showing the withdrawal of the first promulgation and the issuance of the second promulgation, the district judge received a copy of the second promulgation in evidence as Carriers' Exhibit No. 1 (P.A. 124-25, 129-130). For the purpose of showing that the organizations served Section 6 notices as vague as the Carriers' second promulgation, the district court received in evidence (P.A. 156-157) as Carriers' Exhibit No. 2, a copy of a document before the Presidential Railroad Commission entitled "The Parties and the Controversy Before The Commission" (P.A. 81-115), in which the Carriers' Section 6 notices (P.A. 95-108) and the Organizations' Section 6 notices were included (P.A. 109). No other evidence was received prior to the entry by the court on August 8, 1962 of its formal order dismissing the amended complaint for failure to state a claim upon which relief can be granted. (P.A. 118). No pleading has ever been filed alleging any of the facts which the Court of Appeals later found controlling.

On appeal by the petitioners to the Court of Appeals for the Seventh Circuit, the judgment of the District

Court was affirmed. In its opinion handed down on November 28, 1962 (Appendix A, *infra*), the Court of Appeals does not appear to hold that the amended complaint, considered as a pleading, fails to state a claim upon which relief can be granted. Rather the Court of Appeals expressly ruled that in considering the case on appeal from the judgment sustaining a motion to dismiss it could judge the "merits of the case stated in the complaint as amended" on the basis of evidence introduced in the District Court after the motion to dismiss had been sustained and notice of appeal had been filed, which evidence had been introduced not for the purpose of judging the merits of the case, but solely on the question of the issuance of a temporary injunction pending appeal, including whether there should be an appeal bond and, if so, in what amount (see footnote 2, p. 3a, *infra*). The Court of Appeals commented that its view that in judging the merits of the case stated in the amended complaint it should consider evidence introduced in the hearing on the injunction pending appeal, was "in harmony with the liberal provisions of Rule 12 (b) (6) and (*c*) of the Federal Rules of Civil Procedure, 28 U.S.C.A. Rule 12" (footnote 2, 3a, *infra*).

In accordance with its thus announced ruling, the Court of Appeals then proceeds to make statements of fact as to matters highly disputed by the parties and as to which the petitioners were never afforded any hearing. While the opinion of the Court of Appeals is not clear it seems to find that the petitioners insisted on unreasonable rules which cost the carriers $592,062,000 in wage costs during 1961 (p. 6a, *infra*) that the petitioners by agreeing to the appointment of the Presidential Railroad Commission waived the usual

procedures of the Railway Labor Act in processing a certain notice of proposed change given to petitioners by the carriers on November 2, 1959 (pp. 8a, 14a, *infra*), that the respondents "accepted" the Report of the Presidential Railroad Commission but that petitioners "rejected" it (p. 9a, *infra*), that the petitioners engaged in "sterile discussion" (p. 15a, *infra*), "frustrated collective bargaining" (p. 17a, *infra*) and that "resort to collective bargaining" failed "without fault of management" (p. 15a, *infra*). Each of these apparent findings of fact rested on matters not appearing on the face of the amended complaint and never put in issue, and seemed to propound facts adverse to the petitioners on the basis of no evidence or conflicting evidence in a record developed for a temporary injunction pending appeal.[2]

The Court of Appeals seems to say that because of its view that management bargained in good faith but

[2] While we deem the evidence introduced in the hearing on an injunction pending appeal completely irrelevant to the sufficiency of the amended complaint, the highly controverted and inconclusive state of the evidence in that record shows that the facts adopted by the Court of Appeals were certainly not uncontroverted. The petitioners never conceded that any existing rules were unreasonable. As to the cost of the allegedly unreasonable rules the only evidence, a short one page statement by a witness for the carriers, was introduced solely for the fixing of the amount of an appeal bond (D.A. 180) and the trial court regarded it as inconclusive even for that purpose (No. 13855, P.A. 30). The first promulgation (P.A. 10-40) departed so substantially from the Report of the Presidential Commission as to raise doubts as to the accuracy of any notion that the carriers accepted the report (Tr. 57). The agreements signed in connection with the establishing of the Presidential Railroad Commission expressly negative any waiver of Railway Labor Act procedures (P.A. 86, No. 13855, P.A. 31-2). The notion that collective bargaining on the November 2, 1959 notices failed without fault of management is refuted by evidence that the carriers never negotiated on these notices (No. 13855, P.A. 6, 34).

labor did not, the respondents thereby became legally entitled to promulgate management prerogatives otherwise impermissible (pp. 15a-16a, *infra*).

With respect to the petitioners' contention that the second promulgation was illegal in that the carriers thereby wipe out the craft or class concept on which the Railway Labor Act is premised, the Court of Appeals stated that since, in its view of the facts, the same organizations represented employees in both road and yard service in the several classes or crafts,[3] the wiping out of class or craft distinctions would have no practical consequences and anyway this involved the carriers' assignment of work which is a subject with which the Railway Labor Act does not deal (p. 17a, *infra*).

If the Court of Appeals did not mean to rule that management prerogatives arise as sort of a penalty for labor's failure to bargain in good faith, the opinion might be read as holding that the extent of management prerogative is under the Railway Labor Act itself a subject for bargaining, as to which management can unilaterally impose its own definition of scope of management rights when labor and management after exhausting Railway Labor Act procedures fail to reach

[3] In making this ruling the Court of Appeals quoted from, and adopted as its own, and relied exclusively upon, a statement from the brief of the carriers (p. 17a, *infra*). While, of course, the evidence as to whether the same organizations represent road and yard employees was not before the court, we are certain the carriers would admit, despite the generality of the statement in their brief, that the Switchmen's Union of North America represents only Yard employees and that carriers could wipe out the craft or class basis upon which the existence of that union depends if they carried out the obliteration of yard class or craft which the carriers promulgated as their unrestricted right (P.A. 67-68).

an agreement defining the scope of management prerogatives (pp. 15a-16a, *infra*. The opinion may also be read as holding either expressly or impliedly, that the subjects dealt with in the promulgation are within management prerogative and hence not mandatory subjects for bargaining under the Railway Labor Act (p. 15a, *infra*).

On December 13, 1962, the petitioners filed a petition for rehearing in the court below pointing out that the Court of Appeals had denied petitioners due process of law in violation of the Fifth Amendment to the Constitution of the United States in considering and basing its decision on findings of fact made by the Court of Appeals on the merits of the case without the petitioners having been confronted with any issues of fact on the merits and without the petitioners having been afforded an opportunity to introduce any evidence on such issues and without findings by the trial court (pp. 1-7, petition for rehearing).

The Court of Appeals denied the petition for rehearing on December 19, 1962 without opinion.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals denied petitioners procedural due process of law in violation of the Fifth Amendment to the Constitution of the United States by admittedly considering disputed evidence to determine facts which were never put in issue or tried. In affirming the dismissal of the amended complaint on the basis of evidence introduced on different issues and for a different purpose, without affording petitioners any opportunity to introduce evidence in support of the merits of the case stated in their amended complaint, the Court of Appeals failed to follow the rule

stated in *Saunders* v. *Shaw*, 1917, 244 U.S. 317. Cf. *Georgia Railway & Electric Co.* v. *Decatur*, 1935, 295 U.S. 165, 171; *Jacobsen* v. *Jacobsen*, App. D.C. 1942, 126 F. 2d 13, 14-15. In *Saunders* v. *Shaw*, this Court held that an appellate court denies a litigant due process of law when it bases its decision on a fact which the trial court deemed immaterial and as to which no issue was tried.

While *Saunders* v. *Shaw* arose under the Fourteenth Amendment, the same constitutional right to procedural due process of law in the federal courts has been provided in the Fifth Amendment. Cf. *Jacobsen* v. *Jacobsen*, App. D.C., 1942, 126 F. 2d 13, 14-15.

Here the deprivation of due process is even clearer than in *Saunders* v. *Shaw*. The trial court by sustaining the motion to dismiss ruled all evidence immaterial—the amended complaint in his view failed to state a claim which could be supported by any evidence—hence petitioners were given no opportunity to introduce any evidence in support of the merits of their case. Except for the second promulgation which respondents introduced as Carriers' Exhibit 1 to establish the mootness of the original complaint (P.A. 124-25, 129-30) and copies of the Section 6 notices as Carriers' Exhibit 2 to show that the organizations' Section 6 notice was as vague as the carriers' (P.A. 156-7), no evidence whatever was received prior to the formal order dismissing the amended complaint or the filing of the notice of appeal.

Only after the notice of appeal was filed was any testimony received by the trail court. And then the evidence was not received on the merits of the case stated in the complaint. The evidence was introduced solely

for the purpose of petitioners' motion for injunction pending appeal. On this issue petitioners were successful. The district court found they had made out the kind of a case necessary for an injunction pending appeal and made findings in their favor (No. 13855, D.A. 90-94) and entered the requested injunction (No. 13855, D.A. 94). This injunction was affirmed by the Court of Appeals on November 28, 1962. Thus this is not even a case where evidence is drawn from a record in which the litigants failed to meet their burden on the issues then before the court. Petitioners had no duty to attempt to go further in the hearing on injunction pending appeal and try to prove their case on the merits. The instant case hence is like the *Saunders v. Shaw* case in that the appellate court has considered material on the appeal, facts not tried in the trial court because they were deemed immaterial by the trial court.

Here there can be no dispute that the Court of Appeals considered on the appeal evidence that was not before the trial court on the motion to dismiss. The Court of Appeals expressly states in footnote 2 of its opinion (p. 3a, *infra*) that it did consider the evidence introduced in the hearing on injunction pending appeal in deciding the "merits of the case stated in the complaint as amended." We believe this statement itself proves a deprivation of petitioners' constitutional rights. That the Court of Appeals considered evidence when petitioners never had any hearing at which they could introduce evidence on the issue for which it was considered, violates due process of law.

However, we are not here left solely with the Court of Appeals' statement that it considered this evidence in deciding the merits of the complaint. The court's

opinion is filled with recitals of alleged facts which do not appear in the complaint as amended, as to which no issues were tendered in the district court, and as to which petitioners were never afforded a hearing. For instance, the crucial recital that the petitioners engaged in sterile discussion and frustrated collective bargaining which failed through no fault of management (pp. 15a-17a, *infra*) rests on the Court's adoption of a view of the facts which was not even argued to either the trial court or the Court of Appeals by respondents. Thus petitioners were never put on notice that such an issue would be deemed relevant.

The assumption of the Court of Appeals (footnote 2, p. 3a, *infra*) that Rules 12(b) (6) and (c) of the Federal Rules of Civil Procedure support its consideration of this evidence is inaccurate. These rules have uniformly been construed, both by the Court of Appeals for the Seventh Circuit[4] and by other courts,[5] as not authorizing the determination of disputed facts on a motion to dismiss.

Nor is there any support for the Court of Appeals' implication in the some footnote that counsel for petitioners "concede" that the court "may" consider evidence outside the complaint on the issue before it. The statement in the brief referred to was addressed to the defendants-appellees' "Supplemental

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[4] *Butcher* v. *United Electric Coal Co.*, 7th Cir., 1949, 174 F. 2d 1003; 1006; *Grand Opera Co.* v. *Twentieth Century Film Corp.*, 7th Cir., 1956, 235 F. 2d 303, 307.

[5] *Herron* v. *Herron*, 5th Cir., 1958, 255 F. 2d 589, 593; *Chappell* v. *Goltsman*, 5th Cir., 1950, 186 F. 2d 215, 218; *Slagle* v. *United States*, 5th Cir., 1956, 228 F. 2d 673, 677-678; *Hoy* v. *Progress Pattern Company*, 6th Cir., 1954, 217 F. 2d 701, 704; 2 Moore's Federal Practice, 2d ed., pp. 2255-2257.

Statement of Facts" and was directed to the irrelevance of those recitals to the issue of whether the complaint states a cause of action.[6] The introductory clause that we do not "here" question that "a Court" may consider matter in another record was for the purpose of emphasizing that the point being made was not the technical one of in which record matters appeared but went to the substantive impropriety of considering anything outside the complaint. When the brief was submitted there was of course no reason to anticipate that the Court of Appeals would completely depart from established standards of due process as it subsequently did.

The review of this case by this Court is imperative to preserve the right to procedural due process of law in the federal courts.

2. This case presents what is probably the most important issue that has yet arisen as to the interpretation and application of the Railway Labor Act. It presents the issue of the extent, if any, to which the Railway Labor Act leaves carriers with managerial prerogatives with respect to rates of pay, rules, and working conditions. This Court in construing the collective bargaining provisions of the National Labor Relations Act (29 U.S.C. 151, *et seq.*), held that the National Labor Relations Board could not decide cases on a fixed view that all insistence by employers on

[6] The sentence reads: "While we do not here question that a Court may consider such materials so presented if it chooses, we submit this Court should not do so on this appeal because the materials so presented are irrelevant to this appeal." The brief then proceeds to point out the irrelevance of the specific recitals of defendants-appellees to whether the amended complaint states a claim on which relief could be granted.

management prerogative clauses was illegal without regard to whether the subjects covered by management prerogative were historically subjects of collective bargaining in the industry. *N.L.R.B.* v. *American National Insurance Co.*, 1952, 343 U.S. 395, 408. There this Court was dealing with collective bargaining on behalf of office employees of an insurance agency in Galveston, Texas. There had been no history of collective bargaining. While this decision has been criticized in persuasive terms by outstanding authorities on labor law as making the content of the duty to bargain depend on the state of collective bargaining in the industry,[7] there has never been any suggestion anywhere

[7] See, *e.g.*, Nathan P. Feinsinger, The National Labor Relations Act and Collective Bargaining 57 Mich. Law Rev., 807, 816 (April 1959), who states:

> "To the extent that the *American National Insurance Co.* holding is based on pre-Wagner Act practice, it is questionable. Previously, the union had no legally enforceable right to insist on anything; its sole resort was to economic force. The National Labor Relations Act, imposing on the employer the legal duty to bargain on 'rates of pay, wages, hours of employment, or other conditions of employment' changes the picture. The duty to bargain includes the obligation to recognize the role of the union as a joint participant in the establishment of employment standards. By insisting on a management prerogative clause covering statutory subjects of collective bargaining the employer seeks to withhold such recognition. The employer may properly propose such a clause, but it is difficult to see how the union may be forced to accept the proposal and thereby surrender a statutory right as the price of an agreement. There is no real distinction between an employer's refusal to agree to any standard to govern working schedules, for example, and a refusal to consummate an agreement unless the union agrees to the removal of that subject from the bargaining table. Pre-Wagner Act practice is not in point, because under that practice the employer was legally free to take either position. There is no basis for inferring that Con-

before this case that an employer could insist on management prerogative over a subject which has traditionally been a subject of collective bargaining not only in the industry but also between the specific employer in question and his employees. Both the courts[8] and the National Labor Relations Board[9] have uniformly held that once a subject has been established as a collectively bargained item between an employer and his employees or in the industry, the employer may not insist on his management prerogative. While as to any subject or group of subjects the employer may pro-

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gress intended to prevent him from one position but not the other.

"The court's criticism of the Board's approach as an attempt to pass judgment on the *reasonableness* of the employer's proposal is likewise open to question. As the court viewed it, the Board was attempting to require the employer to make a 'concession' in disregard of the express language of section 8 (d). This criticism would be valid if the employer had proposed a particular standard for a work schedule, for example, which the Board condemned as unreasonable on the merits. In the case in question, however, the employer had proposed that it have complete discretion on the subject, which means no standard at all. By its holding, the Board was not requiring a 'concession,' but was simply requiring the employer to recognize the union's right to full joint participation with management in the establishment and promulgation of standards of employment, which the court in the *Heinz* case had treated as an essential element in the collective bargaining process."

[8] *Majure Transport Co.* v. *N.L.R.B.*, 5th Cir., 1952, 198 F. 2d 735; *Aluminum Ore Co.* v. *N.L.R.B.*, 7th Cir., 1942, 131 F. 2d 485, 487; *Singer Mfg. Co.* v. *N.L.R.B.*, 7th Cir., 1941, 119 F. 2d 131, 136, certiorari denied, 313 U.S. 595; *N.L.R.B.* v. *Berkley Machine Works & Foundry Co.*, 1951, 4th Cir., 189 F. 2d 904; *N.L.R.B.* v. *Allison & Co.*, 6th Cir., 1948, 165 F. 2d 766.

[9] *"M" System Inc.*, 1960, 129 N.L.R.B. 527, 551; *Duro Fittings Co.*, 1961, 130 N.L.R.B. 653, 660-2; *Mooney Aircraft Inc.*, 1962, 138 N.L.R.B. No. 136.

pose that the union waive its joint participation in establishing standards, the employer cannot insist either that the union negotiate the question of whether joint participation should be waived or that it can promulgate its management prerogative as the applicable method of governing the matter in the future. Indeed, the National Labor Relations Board has held that a union violates its duty as the representative of its constituency if the union waives its rights to participate without obtaining a substantial *quid pro quo* for the employees in return for its waiver. *"M" System, Inc.*, 1960, 129 N.L.R.B. 527, 551;

In the instant case the complaint as amended alleged that all the subjects which the second promulgation declared to be within management's unrestricted rights had for many years been covered by numerous and detailed rules contained in collective bargaining agreements between the petitioners and respondents and that "for many years it has been the custom, practice and usage for said collective bargaining agreements to contain such rules" (P.A. 54). There can thus be no basis upon which the carriers can, consistently with the Railway Labor Act, announce that from August 16, 1962, there shall be no rules about these subjects but instead they shall be governed by management's unrestricted discretion. This case unlike *Order of R. Telegraphers v. Chicago N. W. Ry. Co.*, 1960, 362 U.S. 330, is not pivoted on the issue of what is included within the subjects of mandatory bargaining. The Promulgations, both the first and second, avowedly deal with "rules" governing the employment relationship; they are each denominated "Promulgation of Revisions in Work Rules". And "rules" is one of the subjects of mandatory bargaining specifically named in the Railway Labor Act.

The opinion below has the effect of repealing as to operating employees those provisions of the Railway Labor Act imposing the duty to make and maintain agreements concerning rates of pay, rules, and working conditions. For a bargain about wages or hours of work is meaningless if the carrier retains the uncontrolled discretion to determine the nature, extent, type, place and manner of work. A bargain defining wages and hours but not job assignment is like a bargain to buy 100 acres of real estate for $1,000 with the buyer having the right to take whatever kind of land he wished—wooded, mineral, fertile, industrial, grazing, orchard or desert. The legislative history of the Railway Labor Act shows that the draftsmen considered that the term "rules" served in the railroad industry to define the *quid pro quo* for rates of pay—that is to define what the worker was contracting to furnish the employer in return for the agreed wage. See 67 Cong. Rec. 8812-8813, Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, on H.R. 7180, 69th Cong., 1st Sess., January 27, 1926, p. 56. Indeed, detailed rules on all the subjects covered by the second promulgation long antedated the enactment of the Railway Labor Act. The draftsmen premised the Act on the existence of these rules and expressly stated their intention to impose the legal duty to have all these matters determined by the joint participation of labor and management.[10]

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[10] 67 Cong. Rec. 4651, 4665, 4703; Hearings on S. 2646, 68th Cong., 1st Sess., Senate Committee on Interstate Commerce, March 18, 1924, pp. 16-17; Hearings on H.R. 7180, 69th Cong., 1st Sess., House Committee on Interstate and Foreign Commerce, January 28, 1926, p. 66.

The court below by treating the extent of management prerogative as to wages, hours, and conditions of employment as a bargainable subject and by failing to recognize it was thereby placing it in an employer's discretion whether to permit union participation at all, has construed the Railway Labor Act in a manner which calls for the consideration and guidance of this Court. The instant case is itself of tremendous importance. Substantially all the railroads in the country are involved. Utter chaos will follow if established practices of collective bargaining are summarily destroyed, as they will be if the promulgations are not enjoined. The principle involved is likewise basic to labor relations not only in the railroad industry but also in industry generally. Unless corrected the decision below invites emulation with resulting turbulence.

The case is thus one which calls for the issuance of the writ of certiorari to review the construction placed on the Railway Labor Act.

3. To the extent that the Court of Appeals bases its decision on the view that subjects dealt with in the promulgation are not covered by the Railway Labor Act, it presents an important question of federal law. We believe that under the principles affirmed by this Court in *Order of Railroad Telegraphers* v. *Chicago & N.W.Ry.Co.*, 1960, 362 U.S. 330, the court below was clearly wrong when it adopted as its own the carriers' statement that assignment of work is a subject with which the Railway Labor Act does not deal (pp. 17a, *infra*). Assignment of work is equally within the words defining subjects about which bargaining is required by law—it is a condition of employment. The assignment of work as a subject of mandatory

collective bargaining is equally within the spirit and intent of the provisions of the Railway Labor Act imposing on carriers and employees the duty to attempt to reach an agreement.

4. The question of the extent to which carriers may properly abolish crafts and classes, as by merging yard and road service, is also of importance in the administration and application of the Railway Labor Act. The Railway Labor Act repeatedly presupposes the integrity and recognition of class or craft, and bases its structure and functioning on the existence of established crafts or classes. Unlike the National Labor Relations Act it does not leave the delineation of appropriate bargaining units to *ad hoc* determination; Section 2, Fourth provides that the majority of any craft or class shall determine the representative of the craft or class. The craft or class unit is a dominant feature of the union-shop amendment contained in Section 2, Eleventh. The National Railroad Adjustment Board provisions are predicated upon the existence of the five national organizations who are here petitioners by providing for five members of the First Division of the National Railroad Adjustment Board to be designated by national organizations representing operating employees. Section 3, First (h).

The second promulgation abolishes all rules limiting the assignment of yard crews to perform both road and yard service, abolishes many rules limiting the use of road crews to do yard work, and states management's exclusive right to abolish yard service (P.A. 67-68). The report of the Presidential Railroad Commission describes the road-yard service proposals of the carriers as follows (p. 177):

> "The Carriers' Proposal for all practical purposes would completely obliterate the distinction between road and yard service. They propose a merging of all road and yard seniority lists."

If road and yard seniority lists were merged, the petitioner Switchmen's Union of North America would be left without any craft or class to represent, for it represents only yard employees. This craft or class has existed since the beginning of railroads in this country and has been represented by the Switchmen's Union of North America since before the turn of the century. We know of no governmental study which has ever suggested abolishing the craft or class. The Presidential Railroad Commission not only rejected the carriers' proposal as without foundation but found that collective bargaining had been working effectively to settle most problems of delineation between road and yard service. Thus, the Report states (p. 176):

> "The proposal as made by the Carriers involves broad and sweeping changes in the traditional concepts of the separability of road and yard service. The record does not support the need for such changes * * *.
>
> "* * * the machinery provided for the extension of switching limits has been working well; so well, as a matter of fact, that in a majority of instances, in which the carriers have proposed switching limit extensions, agreements have been reached without resort to arbitration."

The decision of the Court of Appeals accepts as true a general statement in the carriers' brief that the several classes or crafts involved are represented by the same organization whether they work in road or

yard service. This is not true with respect to the Switchmen's Union of North America, which admittedly represents only employees working at yard work. This is another instance in which the court below denied petitioners due process of law by finding facts where no trial of the issue was had. But completely aside from the due process point, the assumption by management of the right unilaterally to abolish crafts or classes, is, we submit, a violation of the Railway Labor Act.

While the court below did decide this issue, it suggested that the petitioners had not raised it in the District Court (p. 17a, *infra*). But the wiping out of crafts or classes was one result of the absence of rules and hence was raised by the amended complaint in its attack on the second promulgation as illegal because of its announcement that there would be no rules concerning assignments and clasification of assignments except in road passenger service (P.A. 54-55).

The Court of Appeals also adopted as its own (p. 17a, *infra*) the statement in the carriers' briefs that the petitioners' attack on the promulgation as abolishing crafts and classes goes merely to the assignment of work and that the Railway Labor Act does not deal with this subject. But the abolition of the distinction between yard and road work raises more than a question of assignment of work—it raises the question of destruction of a collective bargaining unit by managerial fiat. Nor is it sound law to hold that an assignment of work is not a bargainable issue.

The second promulgation not only permits a complete obliteration by the carriers of the entire basis

for the existence of the Switchmen's Union but allows carriers to obliterate distinctions between other crafts and classes.

We submit that the question of whether under the Railway Labor Act, such destruction of established crafts or classes may legally be accomplished by unilateral carrier decree, is an important question requiring decision by this Court.

CONCLUSION

For the foregoing reasons, we respectfully submit, that writ of certiorari should issue to review the judgment of the court below and that this Court should hold that petitioners are entitled to a trial on their complaint as amended.

Respectfully submitted,

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January 8, 1962

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 13876 SEPTEMBER TERM, 1962 SEPTEMBER SESSION, 1962

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *et al.*,
Plaintiffs-Appellants,
v.
THE BALTIMORE & OHIO RAILROAD COMPANY, a corporation, *et al.*,
Defendants-Appellees.

} Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

November 28, 1962

Before SCHNACKENBERG, CASTLE and SWYGERT, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* A complaint was filed in the District Court by plaintiffs, Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railway Conductors and Brakemen, Brotherhood of Railroad Trainmen, and Switchmen's Union of North America, unincorporated labor organizations. It designated as defendants, The Baltimore & Ohio Railroad Company and fifteen other named railroad companies, described as representatives of a class of railroads that

is so numerous (more than 200) as to make it impracticable to bring them all before the court.

The complaint sought a judgment declaring unlawful a July 17, 1962 Promulgation of Revision in Work Rules issued by defendants, with respect to defendants' operating employees represented by plaintiffs in collective bargaining duly authorized under the Railway Labor Act, 45 U.S.C.A. § 151, *et seq.* Each of the members of the class represented by defendants is a carrier as defined in § 1 of the Act.[1]

On August 6, 1962 at the conclusion of arguments on a motion of the Carriers to dismiss the complaint, they were permitted by the court and without objection from the Organizations, to withdraw their July 17, 1962 promulgation of rules changes. The Carriers then by letter issued a promulgation of rules changes dated August 6, 1962, which stated that the changes proposed by the Carriers in their notices served under § 6 of the Railway Labor Act (45 U.S.C.A. § 156) on November 2, 1959 would become effective August 16, 1962. The Organizations thereupon amended their complaint to seek similar relief against the later promulgation.

On August 8, 1962, the court, after hearing arguments upon the Carriers' motion to dismiss, entered an order dismissing the amended complaint for failure to state a claim upon which relief could be granted and also denying a motion for a preliminary injunction based thereon. The Organizations appealed from that order and moved for an injunction pending appeal, under 28 U.S.C.A. Rule 62 (c). This injunction was granted on August 10, 1962. In our case No. 13855 we heard arguments on a motion of the Carriers to dissolve and vacate that injunction and on August 15, 1962 we denied the motion. We have this day disposed of that case.

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[1] Plaintiffs are sometimes hereinafter referred to as the Organizations and defendants will at times be referred to as the Carriers.

In case No. 13876 there was evidence tending to prove the facts which we now summarize.[2]

By letter dated February 10, 1959, President Loomis of the Association of American Railroads invited the Organizations to join with the Carriers in seeking the creation of a presidential commission to investigate and make a report on rules about which the Carriers complained, and, more particularly, the impact of the existing rules on the public welfare.

This proposal was rejected by the Organizations on June 4, 1959 in a letter to President Loomis. At the same time they addressed a letter to the Secretary of Labor of the United States, in which it was stated:

> "In the event that an effort is made by Mr. Loomis or the railroad representatives to induce President Eisenhower to appoint a board or commission to investigate what they term 'featherbedding of railroad employees', we hope that you will see fit to suggest to the President that such a board or commission should

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[2] The Organizations in a reply brief submit that, on this appeal, we should not consider certain factual matters appearing from evidence in the record, because they are *irrelevant* on this appeal. They do concede, however, that they do not question that we may consider such material if we choose. The criticism is directed at facts proved by the Carriers before the district court in connection with the Organizations' motion for injunction pending appeal hereinbefore referred to, *supra*.

We do not deem it our duty to close our eyes to relevant facts actually appearing before us in the record. The mere occasion for their proof does not render them irrelevant. We hold that this evidence was relevant, not only on the question of the issuance of an injunction pending appeal, but also on the merits of the case stated in the complaint as amended. Both phases of the case involved the same general subject matter and the identical parties. Cf. *United States* v. *Nuddelman*, 7 Cir., 104 F. 2d 549, 552; and also *Wilson* v. *Calculagraph Co.*, 1 Cir., 153 Fed. 961, 962.

This view is in harmony with the liberal provisions of Rule 12 (b) (6) and (e) of the Federal Rules of Civil Procedure, 28 U. S. C. A. Rule 12.

not be appointed; but that if any investigation is to be made, it should be made along the lines of the Report of Emergency Board No. 109 and take into consideration all phases of the industry, including managerial and financial practices, instead of singling out the operating employees exclusively."[3]

Testimony at the trial supports the factual allegations in a letter by Mr. Loomis to the President of the United States, under date of August 17, 1959, from which we quote:

"1. For more than 20 years, efforts have been made to negotiate changes in the light of the great technological improvements in the industry, but such efforts have produced no substantial or meaning. l relief.

"2. Continued existence of these rules imperils employment in the industry. In the last decade, an average of 1,000 jobs a week has been lost, and an even greater loss is inevitable if the rules are not modernized in keeping with mid-Century operating practice and competitive reality.

"3. Need for a broad study of the wage and rules structure by a special Presidential Commission has been noted by numerous Presidential Emergency Boards, including Board No. 109, which you appointed in 1955. This Board stated clearly: 'There is imperative need in this industry and specifically in the operating classifications for a thoroughgoing review and modernization of the internal wage structures. Indeed, such a review and rationalization is long overdue.' That Board was immediately concerned with the question of wage differentials between classes of employees but its recommendation constitutes a clear recognition that a broad study of the operating wage and rules structure such as is now sought calls for the appointment of a special Presidential Commission.

[3] The term "featherbedding" did not appear in Mr. Loomis' letter.

"5. The Interstate Commerce Commission, in its landmark report of May 18, 1959, on the railroad passenger deficit problem, called for a public review and revision of working rules for railroad employees.

"6. A study now, in an atmosphere of calmness, can achieve far more effective results than fact-finding by the Presidential Emergency Board provided for by law if the issue threatens a transportation tie-up. As the current three-year moratorium on work-rule changes expires on October 31, 1959, it seems to us most urgent that action be taken in advance of possible crisis and while there is still time for rational decisions in the national interest.

"7. Finally, and perhaps most important, drawing up sound, new work standards for the railroad industry has become so complex and challenging that the machinery provided for settling ordinary disputes appears hopelessly inadequate to cope with this task. Only a new, broader-based and determined approach has real hope of coming up with workable and fair solutions.

"For all these primary reasons, Mr. President, railroad management appeals to you to appoint a commission clothed with the objectivity and prestige of your office to examine this problem from the standpoint of the public's interest, and to recommend steps to bring these rules into line with modern conditions to the benefit of all parties concerned."

On August 24, 1959, the Organizations wrote to the President opposing his appointment of a Commission and urging a policy of non-government intervention.

The President, by letter dated September 9, 1959, refused to appoint a commission.

On November 2, 1959, the Carriers served on the representatives of the Organizations, pursuant to the provisions of Section 6 of the Railway Labor Act, notices of intended changes in agreements affecting rates of pay, rules and working conditions, which proposed changes are now be-

fore this court. These proposed changes in existing agreements contemplate the following:

1. The elimination of existing rules and agreements requiring the use of firemen on other than steam locomotives when used in yard and freight service.
2. The revision of rules governing the basis of pay and the assignments of railroad operating employees used in through freight and straightaway passenger service.
3. The elimination of rules requiring the use of a stipulated number of trainmen in road train crews and a stipulated number of brakemen (helpers) in yard ground crews.
4. The elimination of rules requiring the use of operating employees on motor cars and self-propelled work machines used in inspection, construction, repair and maintenance work, and
5. Various miscellaneous and minor other changes which are not material in these proceedings.

The evidence in the record is to the effect that certain rules contained in existing agreements between the Carriers and their operating employees, during the year 1961, cost the railroad industry $592,062,000 in wage costs for unneeded employees occupying redundant positions, pay for time not worked, compensation that was not commensurate with the value of the services rendered, and the cost of owning and maintaining equipment and facilities that would not be required apart from the restrictions placed upon the efficiency and economy of operations by such rules.

Following service of the Carriers' notice, the proposals therein contained were the subject of conferences on individual railroads, but no agreements were reached. On June 9, 1960, the Carriers requested concerted national handling of their proposals by national bargaining commit-

tees designated by the Carriers and the Organizations. Meetings of such national bargaining committees were begun on July 6, 1960, and extended through October 17, 1960. During such national conferences the Organizations contended that the ordinary processes of the Railway Labor Act were not suited to handling the Carriers' proposals, and now urged that the parties agree to refer the Carriers' proposals and such other proposals as either party might desire to submit to "a special wage study commission." This merely produced further correspondence.

On October 17, 1960, an agreement was entered into between the Carriers and the Organizations, under the auspices of the Secretary of Labor, providing for the creation of a Presidential Railroad Commission to investigate the facts and report its findings and recommendations to the President with respect to the controversy between the parties—substantially as proposed by the Organizations. It was further provided in said agreement that the "controversy between the parties" involved the proposals of the Carriers contained in their Section 6 notices of November 2, 1959, and proposals of the Organizations served on the Carriers on September 7, 1960 (both of which were attached to the memorandum) "including any implementing proposal or proposals that may be submitted to the Commission." The memorandum also contained, among others, the following provisions:

> "2. • • • The Commission may recommend that any proposal or implementing proposal or any part of any such proposal should be rejected in whole or in part or accepted in whole or in part, or should be accepted as amended or revised by the Commission, as it finds under the evidence to be justified.
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> • • • • • •
>
> "4. • • • The Commission shall also be authorized to use its best efforts, by mediation, to bring about an amicable settlement and agreement between the

parties with respect to any issue concerning which the evidence has been heard.

"5. It is the intent of the parties that the proceedings of the Commission, including its mediatory efforts and its report *shall be considered and accepted as in lieu of the mediation and emergency board procedures provided by Section 5 and 10 of the Railway Labor Act.* (Italics supplied.)

"National conferences between the parties under the Railway Labor Act shall be resumed and expedited, provided no settlement is sooner reached, immediately following the report of the Commission.

"In the event the National Mediation Board shall proffer its services, or the Board's services be invoked, the parties will jointly request the Board to expedite mediation and as promptly as feasible terminate the Board's services under the Act."

The Organizations thereafter expressed their entire satisfaction with the arrangements stipulated in the agreement, and reasserted their contention "that the work rules problem is 'too difficult' to be resolved under the regular procedures of the Railway Labor Act"; and on November 1, 1960, the Presidential Commission requested by the parties was duly created by Executive Order No. 10891.

The members of the Commission were appointed by the President on December 22, 1960. Five of the members of the Commission were appointed from nominations submitted by the Organizations, five members from nominations submitted by the Carriers, and five public members were appointed without nominations from the parties.

The Commission began its hearings on February 16, 1961, and delivered its report and recommendations to the President on February 28, 1962. There were 15,500 pages of oral testimony and thousands of pages of exhibits received by the Commission. The Commission also made numerous studies independently of the parties, and was assisted in its

work by a staff of independent technical experts. Beginning in October, following the fact gathering stage of the Commission's proceedings, the public members of the Commission sought to narrow the issues and mediate the differences between the parties, but no agreement was reached.

When the report and recommendations of the Commission were delivered to the President on February 28, 1962, he requested the parties to enter into immediate and expeditious collective bargaining over the issues which remained in dispute. National conferences were resumed on April 2, 1962, and continued through May 17, 1962. The Carriers accepted the report and recommendations of the Presidential Commission but its report and recommendations were rejected by the Organizations, and no agreement was reached.

On May 21, 1962, the Organizations made application for the mediation services of the National Mediation Board under Section 5 of the Railway Labor Act, and during the period May 25 to June 22, 1962, approximately 32 meetings were held with the representatives of the Carriers and the Organizations under the auspices of the chairman of that Board. But the National Mediation Board was unable to bring the parties into agreement.

On June 26, 1962, the National Mediation Board requested and urged that the Carriers and the Organizations enter into an agreement to submit the controversy to arbitration under Section 7 of the Railway Labor Act (45 U.S.C.A. § 157). The Carriers accepted this proffer of arbitration but the Organizations rejected it.

On July 16, 1962, the National Mediation Board advised the parties that in its judgment all practical methods provided for its adjusting the dispute had been exhausted without effecting a settlement, and that the Board had that day terminated its services under the provisions of the Railway Labor Act.

On the next day, the Carriers issued the promulgation of July 17, 1962, *ante* 1, for which the promulgation of August 6, 1962 was substituted, *ante* 2.

1. As amended, the complaint of the Organizations alleges that the Carriers' promulgation of rules of August 6, 1962 violates the Railway Labor Act.

They argue that it is unlawful because, if given effect, it would destroy the basic ingredient upon which the Railway Labor Act and the other federal labor laws depend for success in the elimination of strikes. They define this essential ingredient as knowledge on the part of the employees and their supervisors of the rates of pay and the terms and conditions of employment, the source of which knowledge is the collective bargaining agreement.

In short, they argue that mutual knowledge granted by collective agreement, tends to promote understanding between the employees and the employer and hence reduces the occasions for surprise, for friction, for discontent, for strikes, and for interruptions to the flow of interstate commerce. They cite *Teamsters Union* v. *Oliver*, 358 U.S. 283, 295, *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33, and *Labor Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261, 266. They point out that collective bargaining in the railroad industry long antedated the enactment of the Act, especially in the operating crafts, and that it was enacted to prevent unilateral determinations by the carriers. They assert that the promulgation which they now attack would confer on the Carriers just such power of unilateral determination.

In referring to the legislative history of the Act, counsel for the Organizations cite Representative Casey on the floor of the House, when he said, concerning the 1924 bill (65 Cong. Rec. 8923):

> "This bill does not prevent any change in present rates of pay or working conditions, unless the parties agree to a change.

"It does prevent an arbitrary change of wages or rules without notice or opportunity for conference, after which, if an agreement can not be reached, the parties are free to act independently."

The Organizations' cause of action is set forth in the amended complaint as follows:

"Said second Promulgation is in violation of Section 2, First of the Railway Labor Act in that it announces that effective August 16, 1962 there will be no rules concerning the assignment of employees * * * the minimum number of such assignments to a train or engine, and the classification of such assignments, * * * notwithstanding that for many years it has been the custom, practice, and usage for the collective bargaining agreements * * * to contain such rules * * *."

They rely particularly upon 2, First and Seventh (45 U.S.C.A. 152, First and Seventh), and 6 of the Railway Labor Act as indicating that congress intended to achieve stability in conditions and rules under which railway employees perform their services. Section 2, First, provides:

"It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the applications of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

Section 2, Seventh, provides:

"No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title."

Section 6 of the Act reads:

> "Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board. * * *"

The Supreme Court described the nature of the procedures provided by the Railway Labor Act which we deem relevant here, in *Elgin, Joliet & Eastern Ry. Co. v. Burley*, 325 U.S. 711 (1945), where the court said, at 724, that, to induce agreement for the settlement of disputes, the first of three stages required is negotiation, which seeks voluntary action by both sides, in the sense that agreement is sought and cannot be compelled. At 725, the court added:

> "Beyond the initial stages of negotiation and conference, however, the procedures diverge. 'Major disputes' go first to mediation under the auspices of the National Mediation Board; if that fails, then to acceptance or rejection of arbitration, cf. § 7; *Traimen v. Toledo P. & W. R. R. Co.*, 321 U.S. 50; and finally to possible presidential intervention to secure adjustment. § 10. For their settlement the statutory scheme retains throughout the traditional voluntary processes of negotiation, mediation, voluntary arbitration, and conciliation. Every facility for bringing about agree-

ment is provided and pressures for mobilizing public opinion are applied. The parties are required to submit to the successive procedures designed to induce agreement. § 5 First (b). But compulsions go only to insure that those procedures are exhausted before resort can be had to self-help. No authority is empowered to decide the dispute and no such power is intended, unless the parties themselves agree to arbitration."

In *Terminal Assn. v. Trainmen*, 318 U.S. 1, 6, the court made these observations which are pertinent here:

"The Railway Labor Act, like the National Labor Relations Act [29 U.S.C. § 151 *et seq.*], does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them. The national interest expressed by those Acts is not primarily in the working conditions as such. So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions. *The federal interest that is fostered is to see that disagreement about conditions does not reach the point of interfering with interstate commerce.*" (Italics supplied.)

That language suggests this quotation from *Labor Board v. American Ins. Co.*, 343 U.S. 395, 402:

"The theory of the Act [National Labor Relations] is that the making of voluntary labor agreements is encouraged by protecting employees' rights to organize for collective bargaining and by imposing on labor and management the mutual obligation to bargain collectively.

"Enforcement of the obligation to bargain collectively is crucial to the statutory scheme. And, as has long been recognized, performance of the duty to bargain requires more than a willingness to enter upon a sterile discussion of union-management differences.

> Before the enactment of the National Labor Relations Act, it was held that the duty of an employer to bargain collectively required the employer 'to negotiate in good faith with his employees' representatives; to match their proposals, if unacceptable, with counter-proposals; and to make every reasonable effort to reach an agreement.' • • •"

In *California* v. *Taylor*, 353 U.S. 553, 566, speaking of the Railway Labor Act and its machinery for conciliation, mediation, arbitration and adjustment of disputes, the court said:

> "• • • A primary purpose of this machinery of railway government is 'To avoid any interruption to commerce or to the operation of any carrier engaged therein. . . .' • • •"

and also

> "• • • Its continuous operation is important to the national flow of commerce."

While in this case both parties recognize that collective bargaining between the Organizations and the Carriers is required by the Railway Labor Act, *Virginia Ry.* v. *Federation*, 300 U.S. 515, we know of no requirement as to precise form or method of such bargining. For that reason, we conclude that the conference between the respective parties on individual railroads, following the service on November 2, 1959 of the Carriers' notices, were steps in collective bargaining and that the same is true of the national conferences thereupon held and extending through October 17, 1960. Furthermore it is our opinion that the October 17, 1960 agreement between the Carriers and the Organizations providing for a commission, as hereinbefore set forth, is to be considered as another step in collective bargaining, especially inasmuch as it was expressly agreed that the Commission's mediatory efforts and report should be considered and accepted as in lieu of the somewhat similar procedure provided by the Railway Labor Act.

In reviewing the history of the Carriers' notice of proposed rule changes on November 2, 1959, we find that these proposals were a proper subject of bargaining procedures and at all levels as required by law. Significantly the proffer of arbitration by the National Mediation Board, although accepted by the Carriers, was rejected by the Organizations.[4] While the Organizations participated in the various procedures, their refusal to conform to the results reached by the machinery set up for the purpose of avoiding interruption to commerce reduced their participation in the various steps of negotiation to a mere "sterile discussion" of differences, thus placing the Carriers in a position to exercise their prerogatives to unilaterally put into effect their proposed changes, unless proscribed by the Railroad Labor Act. *Labor Board* v. *American Ins. Co.*, *ante* 11.

We have reached the following conclusions which are applicable to the situation now before us:

(a) There is an area in the administration of a railroad business in which management is free to operate without consultation with the representatives of its employees.

(b) The exercise of management's prerogatives is however subject to the employees' right to bargain collectively in areas covering rates of pay, rules and working conditions of the employees, and on the question whether these areas include the proposed rules before us relating to the operating employees of the railroad.

(c) When, after compliance with the procedural requirements of the Act relating to a proposed change in an existing agreement or the introduction of new terms where no agreement exists, resort to collective bargaining fails without the fault of management, it may there-

[4] Although they violated no legal obligation by their refusal. 45 U. S. C. A. § 157, First. Cf. *E. J. & E. Ry. Co.* v. *Brotherhood of Railroad Trainmen*, 302 F. 2d 540, 544.

after freely exercise its managerial prerogatives in such areas of operation as may have been up to then disputed.

2. While disclaiming any contention that a carrier may not, after complying with the procedural requirements of the Act and failing to reach agreement, change the rules governing the employment relation, the Organizations argue "that unilaterally established rules must be rules and not a 'rule' that there shall be no rules, and that such a 'rule' that there shall be no rules can be established, if at all, only by agreement".

In view of this contention we have examined the contents of the promulgation under attack and we find that a set of rules is contained in three articles entitled:

I—Use of Firemen (Helpers) on Other Than Steam Power

II—Basis of Pay and Assignment of Employees

III—Consist of Crews.

While the length of this opinion does not permit our including a reproduction of the material set forth in the promulgation, we have examined it carefully and find that it is a statement of detailed rules affecting the work and pay of the operating employees of the railroads. It is not in any way subject to the criticism of being a rule that there shall be no rules. Moreover, a rule regulating the work of operating employees on a railroad is by its nature subject to change. It is not like the immutable laws of the Medes and Persians. It is subject to alteration from time to time consistently with the duties of the carriers to the employees and the public which uses their lines.

We conclude that the promulgation of these rules was an act of management within the area in which the Carriers had a right to exercise their prerogatives without consulting or obtaining approval of the representatives of their

employees, after the Carriers' required submission to collective bargaining had been frustrated by the Organizations, although they had a legal right to do so.

3. Having reached that conclusion, we are compelled by the course pursued by the Organizations through the various procedures, culminating in their rejection of a proffer of arbitration by the National Mediation Board, to hold that such conduct by the Organizations justified the railroads putting into effect the original rules reannounced in their promulgation of August 6, 1962.

4. The Organizations in this court make a separate attack upon the promulgation of August 6, 1962 by charging that it "is susceptible of the interpretation that it announces the repudiation of 'craft' or 'class' in certain situations, a concept at the very heart of the Railway Labor Act." However, the Carriers call our attention to the fact, which is not denied by the Organizations, that this contention was not raised in the district court, either by argument or in the complaint, as amended. This statement is not questioned by the Organizations in their subsequent reply brief. This contention comes too late now. However, we have given consideration to the point raised and as a result are of the opinion that the Carriers are right in the assertion which they have made, and which we repeat:

> "* * * The promulgation simply gives the carriers the right to determine the number of trainmen that shall be used in road train crews and of that number how many are to be assistant conductors, ticket collectors, baggagemen and brakemen. All such employees are now represented by the same organizations for purposes of collective bargaining. It likewise gives the carriers the right to use road crews in yard service and yards crews in road service; but the several classes or crafts involved are represented by the same organizations whether they work in road or yard service. It is clear, therefore, that the organizations' real complaint goes to the carriers' assignment of work. The Railway Labor Act does not deal with this subject."

5. We are aware that the Organizations clearly informed the district court in their complaint, as amended, that

> "If the defendants and the carriers represented by them proceed to put into effect the revisions contained in their second Promulgation, the plaintiffs will be forced to resist said revisions by asking those they represent who are employed by the carriers represented by the defendants to withdraw from the service of said carriers until said second Promulgation is cancelled. * * *"

We would like to believe that this unnecessary threat of a strike of such magnitude as to amount to a national transportation paralysis was ill-advised. If we are wrong in that assumption, then we shall remind the persons responsible that they are dealing with railroad properties which are impressed with a public interest, which is paramount to that of all the litigants in this case. Always invisibly present as a nonparticipating party, at the bargaining table and at every stage thereafter, have been the people of the United States, to whose interest that of the Organizations and the Carriers is subordinate. Through their representatives in congress, the people may resort to such governmental power as is necessary to assert their superiority to any private interest, whether corporate or otherwise. The Carriers enjoy a regulated monopoly in their field. The Organizations enjoy an immunity from the restrictions of anti-trust laws. These references suggest only some of the ways in which the people might respond if any party to this suit resorts to an economic force which would jeopardize the nation, more than the opposing litigant in this case.

For the reasons which we have set forth herein, the order of the district court dismissing the complaint, as amended, and denying a motion for a preliminary injunction is affirmed.

ORDER AFFIRMED.

APPENDIX B

Final Order of the District Court

1. On the 26th day of July, 1962, a complaint for injunction and declaratory judgment was filed in this cause by the plaintiffs herein in which it was alleged, among other things, that a notice and promulgation of revisions in work rules for operating employees of the defendant railroads who are represented by the plaintiff organizations, to become effective on the 16th day of August, 1962, and certain rules or rules changes contained in said promulgation were in violation of the Railway Labor Act. The aforesaid notice and promulgation, which are dated July 17, 1962, are attached to said complaint and there marked "Appendix A."

2. By order of the Court, and with the agreement of the parties, this cause was thereafter set for Monday, August 6, 1962, for the presentation of and hearings on such written or oral motions as the parties might wish to present or have heard.

3. Said cause came on for hearing on said 6th day of August, pursuant to said order, and appearances having been duly entered, the plaintiffs filed their written motion for a preliminary injunction on the grounds set forth in the complaint; and the defendants orally moved to dismiss the complaint on the grounds that this suit has been prematurely brought before the dispute involved has been submitted to and considered by an emergency board, under Section 10 of the Railway Labor Act, and because the plaintiffs have not exhausted their administrative remedies provided in said Act.

4. After arguments had been heard both for and against defendants' motion to dismiss the complaint, the defendants, on said 6th day of August, 1962, with leave of Court and without objection from the plaintiffs, withdrew their notice and promulgation of rules changes dated July 17, 1962, which are attached to the complaint and there marked

"Appendix A," and served upon the plaintiffs a second notice and promulgation of rules changes, dated August 6, 1962, which have been admitted in evidence and marked defendants' Exhibit 1. The defendants then presented their oral motion to dismiss the complaint on the grounds that the issues therein tendered had become moot.

5. On Tuesday, August 7, 1962, this cause came on for further hearings on the aforesaid motions; and the Court, for reasons stated in the oral opinion of the Court, which appears in the transcript of its proceedings on August 7, 1962, and which by reference is incorporated herein, overruled and denied the defendants' motion to dismiss the complaint described in paragraph 3 above.

6. Opportunity was then given to the parties to present further arguments and evidence in support of and in opposition to the defendants' motion to dismiss the complaint on grounds that the issues tendered in the complaint had become moot; and the Court then found that because the notice and promulgation complained of in the complaint had been withdrawn by the defendants, without objection from the plaintiffs, the issues tendered in the complaint and in the plaintiffs' motion for preliminary injunction had become moot, and defendants' second motion to dismiss the complaint was thereupon granted and the complaint was dismissed by order of the Court.

7. The plaintiffs thereupon orally moved the Court for leave to amend the complaint or to file an amended complaint for the purpose of alleging that the second notice and promulgation of the defendants, dated August 6, 1962, which have been marked defendants' Exhibit 1, also violate the provisions of the Railway Labor Act; and, following arguments of counsel, plaintiffs further requested and were granted leave to present their motion together with their proposed amendments or amended complaint in writing in open court at 10 a.m. on Wednesday morning, August 8, 1962.

8. At said time and place plaintiffs did present their motion in writing and leave was then and there granted to the plaintiffs to file amendments to their complaint or an amended complaint; and plaintiffs thereupon duly filed their amendments to their complaint or amended complaint with the Court; and simultaneously filed a second motion for a preliminary injunction.

9. The defendants then moved to dismiss the amended complaint filed by the plaintiffs on grounds that said amended complaint fails to state a claim upon which relief can be granted.

And the Court, having heard arguments of counsel, both in support of and in opposition to the defendants' motion to dismiss, and being fully advised in the premises, does hereby order, adjudge and decree that the second motion for a preliminary injunction is denied and that this suit and the amended complaint of the plaintiffs shall be and hereby are dismissed because plaintiffs' amended complaint fails to state a claim upon which relief can be granted.

Entered this 8th day of August, 1962.

(Signed) J. S. Penny
Judge

APPENDIX C

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

Chicago 10, Illinois

Wednesday, November 28, 1962

Before Hon. ELMER J. SCHNACKENBERG, Circuit Judge, Hon. LATHAM CASTLE, Circuit Judge, Hon. LUTHER M. SWYGERT, Circuit Judge

No. 13876

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *et al.*,
Plaintiffs-Appellants,
v.
THE BALTIMORE & OHIO RAILROAD COMPANY, a corporation, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order of the said District Court dismissing the complaint, as amended, and denying a motion for a preliminary injunction, in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.

APPENDIX D

Statutes Involved

The Railway Labor Act (48 Stat. 926, 45 U.S.C. § 151 *et seq.*) provides:

* * * * * *

"Sec. 2. * * *

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort, to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

* * * * * *

"Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice. * * *

* * * * * *

"Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

* * * * * *

"Eleventh. Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or of any State, any car-

rier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted—

"(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class . . .

. . . . . .

"(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in section 3, First (h) of this Act defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however*, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in

which he is employed on the effective date of the first agreement applicable to him: *Provided, further*, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

. . . . . .

"Sec. 3. First. There is hereby established a Board to be known as the 'National Railroad Adjustment Board' * * * and it is hereby provided -

. . . . . .

"(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

"First division: To have jurisdiction over disputes involving train and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostlers helpers, conductors, trainmen, and yard service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

. . . . . .

"Sec. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or con-

ferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 730

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, BROTHERHOOD OF RAILROAD TRAINMEN, and SWITCHMEN'S UNION OF NORTH AMERICA, *Petitioners*,

v.

THE BALTIMORE & OHIO RAILROAD, *et al.*, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 730

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, BROTHERHOOD OF RAILROAD TRAINMEN, and SWITCHMEN'S UNION OF NORTH AMERICA, *Petitioners,*

v.

THE BALTIMORE & OHIO RAILROAD, *et al., Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

PRELIMINARY STATEMENT

The petitioners' statement of "Questions Presented" and the "Statement" which follows in the petition do not fairly indicate the nature of the issues raised by the amended complaint, or the nature of or bases for the decisions of the District Court and the Court of Appeals.[1]

[1] Merely as illustrative, compare the statement in the petition that the original complaint "was held by the district court to [illegible] a good cause of action" (p. 4) with paragraphs 3 to 6 of the final order of that court (pp. 19a, 20a).

As will appear *infra* (pp. 14 to 21), the decisions of the lower courts do not present any question of due process of law. There is consequently no basis for the first question suggested in the petition. The question numbered 4 in the petition (now supplemented for the first time by question numbered 3) is not properly involved in these proceedings. It was not pleaded, argued, mentioned, or referred to by the petitioners in the District Court. The Court of Appeals held that "This contention comes too late now." (Opinion, p. 14; Petition, p. 17a.) The other questions which appear in the petition are stated in generalities and in utter disregard of the issues which petitioners raised in their amended complaint (P.A. 53-55) as well as the basis upon which the lower courts proceeded.

The questions presented, the facts involved, and the proceedings had in the courts below are correctly stated *infra* (pp. 2 to 11). The spurious questions presented in the petition are considered in the succeeding argument.

QUESTIONS PRESENTED

1. Does the Railway Labor Act prohibit a carrier, which has complied with all of the procedural provisions of the Act, from changing or altering existing agreements between such carrier and its employees concerning rates of pay, rules, and working conditions by eliminating from such agreements a rule or rules requiring the carrier to employ a fireman (helper) on diesel and electric locomotives used in freight and yard service[2], and promulgating a rule that management has the right to determine when and if a fireman (helper) shall be used on such locomotives?

[2] Under most existing agreements carriers are not required to use a fireman on diesel locomotives weighing 90,000 pounds or less on their driving wheels, when used in yard service, if such power was installed on or prior to June 1, 1950.

2. Does the Railway Labor Act prohibit a carrier, which has complied with all of the procedural provisions of the Act, from changing or altering existing agreements between such carrier and its employees concerning rates of pay, rules and working conditions by eliminating from such agreements a rule or rules specifying the number and classification of trainmen which shall be used in road train crews and the number of brakemen (helpers) which shall be used in yard ground crews, and promulgating a rule providing that management has the right to determine when and if trainmen shall be used in road crews and brakemen (helpers) in yard crews, and if used, the number and classification of such employees?

STATEMENT OF THE CASE

The labor dispute which has culminated in these proceedings involves efforts of the respondents[3] both to revise and to eliminate certain rules contained in existing agreements between the carriers and their operating employees which, during the year 1961, cost the railroad industry more than 592 million dollars in wage costs of unneeded employees occupying redundant positions; pay for time not worked, compensation that was not commensurate with the value of the services rendered, and the cost of owning and maintaining equipment and facilities that would not be required apart from the restrictions placed upon the efficiency and economy of operations by such rules. (D.A. 180, 192) For more than 20 years efforts have been made by the carriers to negotiate changes in existing agreements relating to this

[3] Respondents will be referred to herein as "carriers" and petitioners as "organizations." References to "D.A." are to Appendix of Defendants-Appellees; "P.A." refers to Appendix of Plaintiffs-Appellants.

subject matter, but such efforts have produced no substantial or meaningful relief. (D.A. 161-2)

The current movement to revise existing agreements was initiated by the carriers on February 10, 1959, when the chief executive officers of the organizations were urged to join with representatives of the carriers in requesting the President to appoint a commission to study the impact of existing agreements between the parties on the public welfare, the solvency of the industry and the security of railroad workers. (D.A. 2, 159, 160) The organizations rejected the carriers' proposal and opposed the carriers' request that the President establish such a commission. In a letter directed to the President, the organizations urged that the issues involved should be handled and determined under the procedures provided by the Railway Labor Act. (D.A. 5-19, 160-165)

On September 9, 1959, the President advised the carriers that he could not consider their proposal because the appointment of a commission at that time could interfere with normal collective bargaining processes. (D.A. 20, 163, 164)

On November 2, 1959, the carriers served on the representatives of the organizations, pursuant to the provisions of Section 6 of the Railway Labor Act, notices of intended changes in agreements affecting rates of pay, rules and working conditions. (P.A. 57-78, 96-108; D.A. 21-40, 137, 165, 166) These proposed changes in existing agreements contemplated the following:

1. The elimination of existing rules and agreements requiring the use of firemen on other than steam locomotives when used in yard and freight service.

2. The revision of rules governing the basis of pay and the assignments of railroad operating employees

used in through freight and straightaway passenger service.

3. The elimination of rules requiring the use of a stipulated number of trainmen in road train crews and a stipulated number of brakemen (helpers) in yard ground crews.

4. The elimination of rules requiring the use of operating employees on motor cars and self propelled work machines used in inspection, construction, repair and maintenance work, and

5. Various miscellaneous and minor other changes which are not material in these proceedings.

The purpose and intent of the carriers' proposals relating to the consist of train and engine crews, as stated in said proposals, is to give railway managements the right to determine when and if firemen will be used on other than steam power in freight and yard service, and the number of trainmen and brakemen that shall be used in road and yard crews, as each carrier may find to be appropriate for the safe, efficient and economical operation of its service.

These proposals were the subject of conferences on individual railroads, but no agreements were reached. (D.A. 42, 166) On June 9, 1960, the carriers requested concerted national handling of their proposals by national bargaining committees designated by the carriers and the organizations. Meetings of such national bargaining committees were begun on July 6, 1960, and extended through October 17, 1960. During such national conferences the organizations contended (contrary to the position they had previously taken) that the ordinary processes of the Railway Labor Act were not suited to handling the carriers' proposals, and now urged that the parties agree to refer the carriers' proposals and such other proposals as either party might desire

to submit to "a special wage study commission." (D.A. 42-76, 137, 166-171)

On October 17, 1960, a Memorandum of Agreement was entered into between the carriers and the organizations, under the auspices of the Secretary of Labor, providing for the creation of a Presidential Railroad Commission to investigate the facts and report its findings and recommendations to the President with respect to the controversy between the parties—substantially as proposed by the organizations. (P.A. 57, 83-109, 145; D.A. 71-76, 171) It was further provided in said Memorandum of Agreement that the "controversy between the parties" involved the proposals of the carriers contained in their Section 6 notices of November 2, 1959, and proposals of the organizations served on the carriers on September 7, 1960 (both of which were attached to the memorandum) "including any implementing proposal or proposals that may be submitted to the Commission." (P.A. 83, 84, 96-109)

The organizations thereafter expressed their entire satisfaction with the arrangements stipulated in the Memorandum of Agreement, and reasserted their contention "that the work rules problem is too difficult to be resolved under the regular procedures of the Railway Labor Act" (D.A. 79, 80, 171, 172); and on November 1, 1960, the Presidential Commission requested by the parties was duly created by Executive Order No. 10891. (P.A. 110, 111)

The members of the Commission were appointed by the President on December 22, 1960. Five of the members of the Commission were appointed from nominations submitted by the organizations, five members from nominations submitted by the carriers, and five public members were ap-

pointed without nominations from the parties. (D.A. 83, 84)[4]

The Commission began its hearings on February 6, 1961, and delivered its report and recommendations to the President on February 28, 1962. There were 15,500 pages of testimony and 25,000 pages of exhibits submitted by the parties and received by the Commission. The Commission also made numerous studies independently of the parties, and was assisted in its work by a staff of independent technical experts. (D.A. 172) Beginning in October, following the fact-gathering stage of the Commission's proceedings, the public members of the Commission sought to narrow the issues and mediate the differences between the parties, but no agreement was reached. (P.A. 57, 145; D.A. 172-177)

When the report and recommendations of the Commission were delivered to the President on February 28, 1962, the President requested the parties to enter into immediate and expeditious collective bargaining over the issues which remained in dispute. (D.A. 127, 128, 138, 139) National conferences were resumed on April 2, 1962, and continued through May 17, 1962. The carriers accepted the report and recommendations of the Presidential Commission but its report and recommendations were rejected by the organizations, and no agreement was reached. (P.A. 12, 13, 57, 58, 145; D.A. 129-134, 140, 177, 178)

On May 22, 1962, the organizations made application for the mediation services of the National Mediation Board under Section 5 of the Railway Labor Act (45 U.S.C. 155), and during the period May 25 to June 22, 1962, approximately 32 meetings were held with the representatives of

[4] On March 5, 1961, President Kennedy appointed Judge Simon H. Rifkind as Chairman of the Commission to assume the post previously held by former Secretary of Labor Mitchell. (D.A. 85-88)

the carriers and the organizations under the auspices of the Chairman of that Board. But the National Mediation Board was unable to bring the parties into agreement. (P.A. 58, 145; D.A. 135, 178, 179)

On June 26, 1962, the National Mediation Board requested and urged that the carriers and the organizations enter into an agreement to submit the controversy to arbitration under Section 7 of the Railway Labor Act (45 U.S.C. 157). The carriers accepted this proffer of arbitration but the organizations rejected it. (P.A. 120-122, 145; D.A. 179, 180)

On July 16, 1962, the National Mediation Board advised the parties that in its judgment all practical methods provided for its adjusting the dispute had been exhausted without effecting a settlement, and that the Board had that day terminated its services under the provisions of the Railway Labor Act. (P.A. 58, 121, 145, 146)

On July 17, 1962, the carriers served notice on the organizations that effective August 16, 1962, the carriers would place in effect the changes in rates of pay, rules and working conditions which had been recommended by the Presidential Railroad Commission.[5] On July 26, 1962, the organizations filed their complaint in the District Court in which they alleged that the carriers' promulgation of rules to make effective the recommendations of the Commission violated the Railway Labor Act: first, because the promulgation embodied provisions which had not been presented to the organizations in the form of a notice pursuant to Section 6 of the Railway Labor Act; second, because cer-

[5] The changes proposed by the carriers to make effective the Commission's recommendations are set forth in their first promulgation of revisions in work rules, which is attached as Appendix A to the complaint filed in the District Court. (P.A. 10-49, 58; D.A. 141, 143, 144)

tain provisions of the promulgation would require the organizations to submit to compulsory arbitration in alleged violation of Section 7 of the Act, and third, because other provisions of the promulgation would impose supposed illegal restrictions on the rights of the employees represented by the organizations to bargain collectively through representatives of their own choosing. (P.A. 5-7)

On August 6, 1962, with leave of court and without objection from the organizations, the carriers withdrew their first promulgation of rules changes, dated July 17, 1962, and served upon the organizations a second promulgation of rules changes, dated August 6, 1962, in which the organizations were given notice that effective August 16, 1962, the carriers would place in effect the rules changes proposed in their notices served under Section 6 of the Railway Labor Act on November 2, 1959. (P.A. 57-78, 117, 124, 125; D.A. 142-148) The District Court and the representatives of the organizations were informed that, although the carriers were willing to settle the dispute on the basis of the Commission's recommendations, the rules proposed for making those recommendations effective were withdrawn and the rules changes proposed by the carriers in their Section 6 notices dated November 2, 1959, were substituted in lieu thereof (in the carriers' second promulgation) in order to avoid litigation or any other development that might delay revision of the provisions of existing agreements that were costing the carriers $1,609,000 each day in unnecessary and unjustifiable operating expense. (P.A. 59; D.A. 142-148, 180, 192)

On August 7, 1962, the District Court overruled a motion of the carriers to dismiss the complaint on grounds that the suit had been prematurely brought before the dispute

involved had been submitted to and considered by an emergency board under Section 10 of the Railway Labor Act and because the organizations had not exhausted their administrative remedies provided in that Act.[6] (P.A. 116, 117) The District Court found that both parties had exhausted all of the procedures available to them under the Railway Labor Act. (P.A. 12, 13, 124, 127, 128, 145, 146) On the same day the District Court dismissed the complaint, finding that the issues tendered in the complaint had become moot. (P.A. 117)

The organizations then filed an amended complaint, alleging that

> "Said second Promulgation is in violation of Section 2, First, of the Railway Labor Act in that it announces that effective August 16, 1962 there will be no rules concerning the assignment of employees of the carriers represented by plaintiffs, the minimum number of such assignments to a train or engine, and the classification of such assignments, except in road passenger service, notwithstanding that for many years it has been the custom, practice, and usage for the collective bargaining agreements between the plaintiffs and the carriers represented by the defendants to contain such rules and notwithstanding the explicit duty imposed

[6] In the course of the hearings on this motion, the District Court was informed that the Secretary of Labor had assured the parties that an Emergency Board would be appointed, under Section 10 of the Railway Labor Act, if the carriers' promulgation and the organizations' asserted intention to resist by the use of economic force should "threaten substantially to interrupt interstate commerce." (Tr. 31-34, 243-46) The dispute remains in this posture, insofar as the applicability of the provisions of Section 10 is concerned. Consequently, denial of the petition will in all probability result in the appointment of an Emergency Board and the attendant procedures of investigation and mediation, during which the carriers may not make effective their proposed rules changes, except by agreement, and the organizations may not pursue their threatened strike action.

> by Section 2, First of the Railway Labor Act upon the plaintiffs and the carriers represented by the defendants to make and maintain agreements concerning such rules." (P.A. 54)

It is important to keep in mind, in considering the issues involved in these proceedings, that this supposed cause of action refers only to rules relating to "the assignment of employees . . . the minimum number of such assignments to a train and engine, and the classification of such assignments, except in road passenger service." It is thus obvious that the amended complaint deals only with the carriers' proposed rules relating to the use of firemen on diesel locomotives in freight and yard service and to the consist of crews in road train service.

After hearings before the District Court on the carriers' motion to dismiss the amended complaint for failure to state a claim upon which relief can be granted, the District Court entered its final order, dated August 8, 1962, "that this suit and the amended complaint of the plaintiffs shall be and hereby are dismissed because plaintiffs' amended complaint fails to state a claim upon which relief can be granted." (P.A. 116-118)

The organizations appealed from this final order of the District Court (P.A. 119), and on November 28, 1962, the Court of Appeals affirmed the order of the District Court. A petition for rehearing was filed with the Court of Appeals by the organizations on December 13, 1962, and was denied on December 19, 1962.

SUMMARY OF ARGUMENT

The organizations' claim, stated in question numbered 1, that the decision of the Court of Appeals rests on unfounded

and unproven findings of fact which were not considered by the trial court and thus involves a denial of due process, is without merit. The facts referred to by the Court of Appeals were before the District Court prior to its dismissal of the amended complaint. They were presented to the Court by statements of counsel and by exhibits, and were undisputed. Counsel for the organizations did not challenge their accuracy, and when afforded opportunities to rebut the facts or to offer further evidence, declined to do so. There is no substance, therefore, to the due process contentions which the organizations present. Furthermore, the issues raised by the amended complaint were decided by the Court of Appeals as a matter of law and on the basis of the allegations contained therein.

The principles of law which the Court of Appeals considered controlling are clearly and firmly established by prior decisions of this Court, and were correctly applied. These decisions hold that the Railway Labor Act deals solely with the procedure to be followed in disputes arising out of proposed changes in rates of pay, rules, and working conditions; that when those procedures have been exhausted, as they have been here, carriers may make unilateral changes in collective agreements governing the working conditions of their employees; that the substance of such changes is not governed or restricted by the Act; and that specifically there is no restriction in the Act on the adoption of provisions giving management a larger measure of discretion in the use or assignment of employees.

Moreover, the existence of large areas of management discretion is recognized under numerous cases and authorities as a normal condition in the relationships between carriers and their employees represented by labor organiza-

tions, and no illegality exists by reason of the creation or existence of such areas.

The organizations' question numbered 3 and the argument relating thereto, are based on the assumption that the Court of Appeals decided a question as to the bargainability of the carriers' proposals. Such an issue is not and never has been in the case. Both sides have treated the carriers' proposals as bargainable throughout and no issue as to this was raised or decided by the Court of Appeals.

Question numbered 4 concerns the holding of the Court of Appeals that the Railway Labor Act in its provisions relating to "craft or class" does not deal with the assignment of work. The organizations' argument, based on scattered references in the Railway Labor Act to the term "class or craft", was and is that these provisions were intended to preserve rights to certain specific work to employees merely because they are in a given class or craft for representation purposes. The Court of Appeals properly rejected these contentions, both because they came too late and because they lack merit. Those provisions of the Act referred to in the petition do not govern the assignment of work to individual employees or as between classes or crafts of employees. Any restrictions of this nature are purely a matter of contract, if they exist at all.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS DOES NOT RAISE ANY QUESTION OF DUE PROCESS OF LAW

In their statement of the questions presented and in the argument in support of their petition, the organizations claim that they have been denied due process of law, arguing that the opinion of the Court of Appeals rests on unfounded and unproven findings of fact. It is contended that no evidence was received or considered by the District Court, and that the organizations had no opportunity to introduce evidence. It is further asserted that the evidence summarized by the Court of Appeals in its opinion was not before the District Court when it dismissed the amended complaint, but was presented subsequently in connection with the organizations' motion for an injunction pending appeal.

None of these contentions are true.

A. Substantially all of the facts summarized in the opinion of the Court of Appeals are undisputed, and were before the District Court when it dismissed the organizations' amended complaint.

Counsel for the carriers prefaced his opening statement in support of the carriers' motion to dismiss the organizations' complaint as follows:

> "The material facts involved cannot be the subject of dispute and will, I believe, be agreed to by counsel for the plaintiffs.
>
> "But if there is any question about any matter that is material to the motion, I am prepared to call witnesses on those matters.
>
> "In any event, with your Honor's leave, I would like to first, and at this time, explain the circumstances

which the defendants rely upon in support of this motion." (Tr. 9, 10; D.A. 137)

Counsel then stated the facts leading up to the proceedings before the District Court, without objection by the organizations, covering the following: —

1. The nature and initial service of the carriers' notices of intended changes in agreements governing the compensation, use and assignments of their employees represented by the organizations. (Tr. 10; D.A. 137) *The carriers' proposed rules changes were later offered in evidence at the suggestion of the District Judge prior to his ruling on the motion to dismiss the amended complaint, and were received in evidence without objection from the organizations as a part of Carriers' Exhibit 2 (P.A. 81-115) "for the purposes of this motion."* (Tr. 129, 130)

2. The circumstances attending the establishment of the Presidential Commission pursuant to a memorandum of agreement between the carriers and the organizations. (Tr. 11, 12; D.A. 137) *This agreement, dated October 17, 1960, and the Executive Order of the President establishing the Commission, were also a part of Carriers' Exhibit 2, which was offered in evidence at the suggestion of the District Court prior to its ruling on the motion to dismiss the amended complaint and received in evidence without objection by the organizations "for the purpose of this motion." (Tr. 129, 130; P.A. 81-115)*

3. The composition and proceedings of the Presidential Commission. (Tr. 12; D.A. 138; Tr. 13; D.A. 138; Tr. 14; D.A. 139)

4. The delivery of the report and recommendations of the Commission to the President, who requested the parties to enter into immediate and expeditious collective bargain-

ing over the issues which remained in dispute. (Tr. 15; D.A. 139). *Excerpts from the statement of the President were read into the record without objection. (Tr. 13-15; D.A. 138, 139)*

5. The proceedings subsequent to the receipt of the Commission's report, including conferences between the parties, (Tr. 15, 16; D.A. 140; see also Tr. 69; D.A. 143), mediation proceedings conducted by the National Mediation Board pursuant to the provisions of the Railway Labor Act (Tr. 15; P.A. 120), and the proffer of arbitration which was accepted by the carriers but was rejected by the organizations. (Tr. 16, 17; P.A. 120, 121; see also Tr. 22, 23; D.A. 141, 142)

6. Advice from the National Mediation Board that in its judgment all practical methods providing for its adjusting the dispute had been exhausted without effecting a settlement, and that the Board had that day terminated its services under the provisions of the Railway Labor Act. (Tr. 17; P.A. 121)

7. The carriers' proposed rules changes were progressed in conformity with all applicable provisions of the Railway Labor Act. (Tr. 22; D.A. 141)[7]

After the foregoing recitation of facts, counsel for the carriers stated

[7] Counsel for the organizations in arguing that the rules changes proposed by the carriers in their second promulgation were not detailed changes in rules, as required by the Railway Labor Act, stated that

> "Now, if they had promulgated in their original notices certain detailed changes in rules and they had been progessed through the procedures of the Railway Labor Act *to the present stage*, then I think that we would have to agree that those changes could be put into effect." (Tr. 97; P.A. 135. See also Tr. 120-124; P.A. 150-153 to the same effect.)

"You will recall that I prefaced my statement to your Honor that if there is any question as to any fact that I have stated, that I am prepared to call witnesses." (Tr. 36)

Neither the court nor counsel for the organizations questioned any part of the carriers' statement of facts, which include all the material facts recited or relied upon in the opinion of the Court of Appeals.

Thereafter, counsel for the organizations stated that

"This Commission that Mr. Neitzert talked about was established." (Tr. 43)

"Here we have had a Section 6 notice; we had this Commission and we had national bargaining and we had mediation by the Mediation Board.

"Now, all that is left for us to do is to threaten—not threaten, but announce that we are going on strike and there will be a national emergency." (Tr. 48)

Following the foregoing statements of counsel, the District Judge found that both the carriers and the organizations had exhausted the administrative remedies available to them under the Railway Labor Act and were free to resort to self-help.*

* The findings of fact and conclusions of law of the District Judge, which were read into the record and which show that he had given consideration to the evidence that had been theretofore presented, include the following:

"This Court does, however, hold that there are no further administrative relief that either of the parties are obligated to, or could, upon their own rights obtain. . . .

"At this stage, and after the National Mediation Board has withdrawn its efforts to effect a settlement, both the Carriers and the Unions are left free to rely upon self-help, and to engage in an economic war which is only restricted by the provisions of Section 10 wherein the President is authorized to appoint an Emergency Board after he has been informed by the National Mediation Board of an emergency, and neither party

During the proceedings which followed, involving the question of whether the amended complaint states a claim upon which relief can be granted, Carriers' Exhibit 2 was received in evidence (see page 15, *supra*), and counsel for the carriers again directed the District Court's attention to the facts that had been theretofore stated. (Tr. 111-114; P.A. 144-146) The District Court then twice asked counsel for the organizations whether they had anything further to submit. In each case counsel for the organizations answered that they did not think so. (Tr. 136, 137; P.A. 161, 162)[9]

The procedure followed in the District Court was in complete conformity with Rule 12(b) of the Rules of Civil Procedure of the United States District Courts; and the District Court thus had before it substantially all of the evidence summarized by the Court of Appeals in its opinion before the organizations' amended complaint was dismissed.

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is required to request the President to appoint such a Board and neither party is prohibited from doing so.

"The evidence indicates in this case that neither has made such a request, though apparently both of them have discussed the problem with the Secretary of Labor. . . .

"There remains no administrative remedy for either party; only self-help remains, the discharge of employees by Carriers that it deems unnecessary to carry on their work or the cessation of work by the employees at the time set for such discharge". (Tr. 84, 85)

[9] Counsels' statements of fact were thereafter corroborated by evidence offered in connection with the organizations' motion for an injunction pending appeal. The organizations have twice agreed that the Court of Appeals might consider this corroborating evidence "if it chooses." (Reply Brief, p. 2; arguments before the Court of Appeals on October 22, 1962; note 2, Opinion, p. 2, Petition, p. 3a. Cf., Petition, pp. 16, 17.) The fact is that substantially all of the evidence summarized by the Court of Appeals in its opinion was presented both before and after the District Court dismissed the amended complaint, as appears from the foregoing discussion of the matter in this brief.

B. The facts which the organizations now allege to be in dispute were in fact undisputed, and all such material facts were before the District Court at the time it dismissed the amended complaint.

The organizations do not contend that it was inappropriate for the Court of Appeals or the District Court to consider undisputed facts appearing of record in determining the sufficiency of the amended complaint. The only findings of the Court of Appeals that are complained of in the petition are there described as follows:

> "While the opinion of the Court of Appeals is not clear it seems to find that the petitioners insisted on unreasonable rules which cost the carriers $592,062,000 in wage costs during 1961 (p. 6a, *infra*) that the petitioners by agreeing to the appointment of the Presidential Railroad Commission waived the usual procedures of the Railway Labor Act in processing a certain notice of proposed change given to petitioners by the carriers on November 2, 1959 (pp. 8a, 14a, *infra*), that the respondents 'accepted' the Report of the Presidential Railroad Commission but that petitioners 'rejected' it (p. 9a, *infra*), that the petitioners engaged in 'sterile discussion' (p. 15a, *infra*), 'frustrated collective bargaining' (p. 17a, *infra*) and that 'resort to collective bargaining' failed 'without fault of management' (p. 15a, *infra*). Each of these apparent findings of fact rested on matters not appearing on the face of the amended complaint and never put in issue, and seemed to propound facts adverse to the petitioners on the basis of no evidence or conflicting evidence in a record developed for a temporary injunction pending appeal." (Petition, pp. 10-11)

Obviously, the Court of Appeals based none of its findings or conclusions upon the fact that

> "The evidence in the record is to the effect that certain rules contained in existing agreements . . . during the

> year 1961, cost the railroad industry $592,062,000 in wage costs. . . ." (Opinion, p. 5; Petition, p. 6a)

although, as the District Court found (Tr. 510, 511; D.A. 192), the carriers' evidence on this subject was undisputed.

The petition misstates the conclusions of the Court of Appeals with respect to the effect of the agreement of October 17, 1960. In any event, no issue of fact is involved, and the court's interpretation of the agreement can scarcely be wrong in that the precise language contained in the agreement is used in the opinion.

It is also undisputed that the carriers accepted and that the organizations rejected the recommendations of the Presidential Railroad Commission. (Tr. 15, 16; D.A. 140, 143; see also page 8, *supra*) No one has ever contended otherwise. Furthermore, during the arguments before the Court of Appeals on October 22, 1962, counsel for the carriers stated (and now reaffirm) that

> ". . . the carriers have at all times been willing, and are now willing, to enter into an agreement with these organizations making effective the recommendations of the Presidential Railroad Commission."

And counsel for the organizations, in answer to a question from the Court, stated that the Commission's recommendations were unacceptable to the organizations. It may also be noted that the official report of the Commission, of which this Court will take judicial notice, shows that the carrier commissioners, although disappointed with many of the provisions of the report, recognized "the public interest being paramount" and accepted "the full report" (pp. 273, 274); and that the representatives of the organizations rejected the Commission's recommendations (pp. 189-271).

The use by the Court of Appeals of the terms "sterile discussion", "frustrated collective bargaining", and "resort

to collective bargaining" which failed "without fault of management" is improperly characterized by the organizations in their petition; nevertheless, no disputed facts are involved. If the Court concluded that the organizations did engage in sterile discussion, that the organizations frustrated collective bargaining, and that collective bargaining failed without fault of the management, its conclusions are entirely warranted on the basis of the undisputed facts which were made a part of the record in the District Court before the amended complaint was dismissed.

The opinion of the Court of Appeals neither recites nor relies upon any disputed fact, and all of the conclusions which appear in its opinion are based upon undisputed evidence which was in the record before the amended complaint was dismissed. Moreover, as the succeeding discussion will show, *the Court of Appeals affirmed the order of the District Court as a matter of law and upon the allegations of the amended complaint.*

II. THE DECISION OF THE COURT OF APPEALS IS BASED ON SETTLED PRINCIPLES OF LAW AND DOES NOT INVOLVE CONSIDERATIONS WHICH WARRANT A REVIEW ON WRIT OF CERTIORARI

Although the organizations attempt to create the impression that this case involves important and novel questions of interpretation and application of the Railway Labor Act, the issues presented to and determined by the Court of Appeals were resolved by the application of settled principles of law. This is not apparent from the discussion which appears in the organizations' petition, but it is fully established when the issues presented to the Court of Appeals are accurately described and the basis of its disposition of the case is correctly stated.

A. The Court of Appeals Affirmed the Order of the District Court as a Matter of Law and Upon the Allegations of the Amended Complaint.

The Court of Appeals correctly summarized the significant allegations of the amended complaint, and the contentions of the organizations, on pages 8 and 9 of its opinion. (Petition, pp. 10a, 11a) The particular allegations of the amended complaint purporting to state the organizations' supposed cause of action are there quoted as follows:

> "'Said second Promulgation is in violation of Section 2, First of the Railway Labor Act in that it announces that effective August 16, 1962 there will be no rules concerning the assignment of employees • • • the minimum number of such assignments to a train or engine, and the classification of such assignments, • • • notwithstanding that for many years it has been the custom, practice, and usage for the collective bargaining agreements • • • to contain such rules • • •.'"

The organizations do not contend that the Court of Appeals misconstrued the amended complaint or that it did not correctly describe the contentions which the organizations have made in support of their claim that the promulgation is unlawful.

Having accurately and succinctly described the issues before it, the Court of Appeals then held that the carriers had complied with all of the procedural requirements of the Railway Labor Act,[10] and are now entitled, under the provisions of that Act, to make effective the proposals which they had served upon the organizations on November 2, 1959. In this connection the Court of Appeals correctly

[10] This fact has never been disputed or denied by the organizations. See pages 16-17 *supra*.

found that the organizations do not contest the right of the carriers to effectuate the rules in question, if the substantive content of the proposed rules is lawful. It stated:

> "While disclaiming any contention that a carrier may not, after complying with the procedural requirements of the Act and failing to reach agreement, change the rules governing the employment relation, the Organizations argue 'that unilaterally established rules must be rules and not a "rule" that there shall be no rules, and that such a "rule" that there shall be no rules can be established, if at all, only by agreement'." (Opinion, p. 13; Petition, p. 16a)

The Court of Appeals then ruled on this single issue raised by the amended complaint, as follows:

> "In view of this contention we have examined the contents of the promulgation under attack and we find that a set of rules is contained in three articles . . . we have examined it carefully and find that it is a statement of detailed rules affecting the work and pay of the operating employees of the railroads. It is not in any way subject to the criticism of being a rule that there shall be no rules." (Opinion, pp. 13, 14; Petition, p. 16a)

The Court of Appeals thus held (as did the District Court) that the proposed rules changes contained in the carriers' promulgation had been progressed through all of the procedures available to the carriers under the provisions of the Railway Labor Act relating to major disputes, that the exhaustion of those procedures made it lawful for the carriers to make such proposed rules changes effective, and that the proposed rules which would confer some discretion upon management in the use and assignment of employees are lawful and proper.

B. The Decision of the Court of Appeals Follows Established Principles of Law and Well Settled Rules Laid Down by the Decisions of this Court.

The organizations argue that

> "This case presents what is probably the most important issue that has yet arisen as to the interpretation and application of the Railway Labor Act. It presents the issue of the extent, if any, to which the Railway Labor Act leaves carriers with managerial prerogatives with respect to rates of pay, rules and working conditions." (Petition, p. 17)

This contention that the Railway Labor Act somehow governs the substantive content of agreements between carriers and their employees, and prohibits rules giving the carriers any discretion in matters relating to working conditions, overlooks the fact that the Railway Labor Act is entirely procedural in nature. See the discussion and description of the procedures in *Elgin, Joliet and Eastern Railway Company* v. *Burley*, 325 U.S. 711 (1945), at page 725, where it is stated that self-help may be resorted to when the procedures are exhausted. The Act does not purport to prescribe or control the substantive results of the procedures required by the Act—or the substantive content of either agreements between a carrier and its employees or rules promulgated by a carrier pursuant to the provisions of the Act.

In *Terminal Railroad Association of St. Louis* v. *Brotherhood of Railroad Trainmen*, 318 U.S. 1 (1943), this Court said:

> "The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them. *The national interest expressed by those Acts is not primarily in the working*

conditions as such. So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. *The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions.* (p. 6)[11]

In *Teamsters Union* v. *Oliver*, 358 U.S. 283 (1959), this Court further stated that

> "Within the area in which collective bargaining was required, Congress was not concerned with the substantive terms upon which the parties agreed. Cf. *Terminal Railroad Assn.* v. *Brotherhood of Railroad Trainmen*, 318 U.S. 1, 6. The purposes of the Acts are served by bringing the parties together and establishing conditions under which they are to work out their agreement themselves." (p. 295)

The decision of this Court and the language quoted *supra* from its opinion in *Terminal Railroad Association of St. Louis* v. *Brotherhood of Railroad Trainmen*, 318 U.S. 1, 6 (1943), was cited and relied upon in *National Labor Relations Board* v. *American National Insurance Company*, 343 U.S. 395 (1952), involving the provisions of the National Labor Relations Act, in support of the finding that

> "The Act does not compel any agreement whatsoever between employees and employers. Nor does the Act regulate the substantive terms governing wages, hours and working conditions which are incorporated in an agreement." (p. 402)

> "Congress provided expressly that the Board should not pass upon the desirability of the substantive terms of labor agreements. Whether a contract should contain a clause fixing standards for such matters as work scheduling or should provide a more flexible treatment of such matters is an issue for determination across the

[11] Emphasis ours in all quotations from the opinions of this Court.

bargaining table, not by the Board. *If the latter approach is agreed upon, the extent of union and management participation in the administration of such matters is itself a condition of employment* to be settled by bargaining." (pp. 408-9)

The position of the National Labor Relations Board, which was found to be untenable, was described as follows by this Court:

> "The Board considers that employer bargaining for a clause under which management retains initial responsibility for work scheduling, a 'condition of employment,' for the duration of the contract is an unfair labor practice because it is 'in derogation of' employees' statutory rights to bargain collectively as to conditions of employment." (pp. 407-408)

This Court rejected the Board's views, on the grounds that "Congress provided expressly that the Board should not pass upon the desirability of the substantive terms of labor agreements." (pp. 408-09) Since this same principle is basic in this Court's interpretation of the Railway Labor Act,[12] it must follow that the rules proposed by the carriers, which would give management some discretion with respect to the consist of train and engine crews, are lawful and may be made effective after compliance with the procedural requirements of the Act.

The organizations also erroneously assert that:

> "Both the courts and the National Labor Relations Board have uniformly held that once a subject has been established as a collectively bargained item between an employer and his employees or in the in-

[12] Compare *National Labor Relations Board v. Jones and Laughlin Steel Corp.*, 301 U.S. 1 (1937) where, at page 45 this Court relied on *Virginian Ry. v. System Federation No. 40*, 300 U.S. 515 (1937), in support of its statement that the Act does not compel any agreement.

> dustry, the employer may not insist on his management prerogative." (Petition, p. 19)

But the decisions of the lower courts and of the National Labor Relations Board cited by the organizations do not support this contention. They only stand for the principle that "bargaining positions may . . . be given evidentiary consideration, along with all other relevant circumstances, in determining whether an employer by the totality of his conduct satisfied the good faith bargaining standards." (*"M" Systems, Inc.*, 129 NLRB 527, 550, 551) Furthermore, virtually all the decisions of the lower courts relied upon by the organizations preceded the decision of this Court in *National Labor Relations Board* v. *American National Insurance Company*, 343 U.S. 395, 408, 409 (1952), discussed *supra*.

The approach of the courts which have had occasion to deal with problems within the scope of this Court's decision in the *American National Insurance Company* case is illustrated by *White* v. *N.L.R.B.*, 255 F.2d 564 (C.A. 5, 1958). In that case the Board had concluded, on the basis of the employer's insistence upon a broad management discretion clause, that the employer had failed to bargain in good faith. The court stated the issue before it as follows:

> "We are at last required to determine whether, in an otherwise unassailable attitude of collective bargaining, the employer may nevertheless be found guilty of a failure to bargain in good faith *solely upon a consideration of the content of the proposals and counter proposals of the parties.* In other words, may the charge of refusal to bargain in good faith be sustained solely by reference to the terms and conditions of the employment contract which management finally says it is willing to sign if such proposed contract could fairly be found to be one which would leave the employes in no better state than they were without it." (pp. 565-6)

The court held that the employer did not commit an unfair labor practice when it insisted upon such provisions. To the same effect are *N.L.R.B.* v. *Lewin-Mathes Co.*, 285 F. 2d 329 (C.A. 7, 1960): ("It is not an unfair labor practice for an employer to bargain in good faith for an agreement assigning particular subjects of collective bargaining to management's exclusive control for the duration of the contract." p. 333); *Associated Unions* v. *N.L.R.B.*, 200 F.2d 52 (C.A. 7, 1952); *N.L.R.B.* v. *San Angelo Standard*, 228 F.2d 504 (C.A. 5, 1955); *N.L.R.B.* v. *Cummer-Graham Co.*, 279 F.2d 757 (C.A. 5, 1960). In *N.L.R.B.* v. *Insurance Agents' International Union*, 361 U.S. 477 (1960) this Court reaffirmed the principle announced in the *American National Insurance Company* case, that "Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences." (p. 488)

There is no dissent from the rule that a carrier, after complying with the procedural provisions of the Railway Labor Act, may revoke or modify any part or parts of the agreements between such carrier and its employees, and where such revocation or modification results in increasing the area or scope of management discretion, with respect to the working conditions of its employees, no violation of the Railway Labor Act results.

This position is supported by the cases cited and discussed above. It is also supported by the following cases and authorities.

1. *Williams* v. *Jacksonville Terminal Co.*, 315 U.S. 386, 402, 403 (1942) held that it was no violation of the Railway Labor Act for a carrier to make unilateral changes in rates of pay, rules and working conditions in areas not covered or restricted by existing agreements, and thus recognized

that the existence of areas of management discretion was not unlawful. *General Committee of Adjustment of the Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas Railroad Company*, 320 U.S. 323, 332, 334, 335 (1943) is to the same effect, in that it held that plaintiff's contentions that an agreement between the railroad and another organization was illegal because of its content and effect on plaintiffs did not give rise to a justiciable controversy. The case thus indicates that the Act does not in any way regulate the content of agreements.

2. The existence of areas of management discretion within the general framework of a collective agreement has also been recognized in many cases involving so-called minor disputes. These cases generally recognize that there is no violation of the Railway Labor Act where a carrier takes action in an area not restricted by collective agreements. *Norfolk & Portsmouth Belt Line Railroad Company* v. *Brotherhood of Railroad Trainmen*, 248 F.2d 34, 41, 44, 45 (C.A. 4, 1957), *cert. den.*, 335 U.S. 914; *Brotherhood of Railroad Trainmen* v. *New York Central*, 246 F.2d 114, 117, 118 (C.A. 6, 1957), *cert. den.*, 355 U.S. 877; *In Re Hudson & Manhattan Railroad Company*, 172 F. Supp. 329 (D.C., S.D. N.Y., 1959), affirmed 267 F.2d 941 (C.A. 2, 1959), *cert. den.*, 363 U.S. 843; *Hilbert* v. *Pennsylvania Railroad Company*, 290 F.2d 881, 883, 884 (C.A. 7, 1961), *cert. den.*, 368 U.S. 900; *Rutland Railway Corp.* v. *Brotherhood of Locomotive Engineers*, 307 F.2d 21 (C.A. 2, 1962); and *Robertson* v. *Atlantic Coast Line Railroad*, 18 Labor Cases, par. 65693 (D.C., D of C, 1950).

3. Other cases have held either that the Act does not regulate the content of agreements or that a carrier having exhausted the procedures of the Act may establish its own rules: *Brotherhood of Railway and Steamship Clerks* v.

Atlantic Coast Line, 201 F.2d 36, 41 (C.A. 4, 1953), *cert. den.*, 345 U.S. 992; *General Committee of Adjustment of the Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas Railroad Company*, 132 F.2d 91, 94 (C.A. 5, 1942), reversed on other grounds, 320 U.S. 323.

4. The National Mediation Board has also recognized the existence of areas of management discretion as explained on pages 17 and 18 of its Twenty-Sixth Annual Report to the Congress (for the fiscal year ended June 30, 1960), and in reports for preceding years.

All the cases briefly referred to above are in harmony with the carriers' position that the Railway Labor Act does not restrict the content of agreements or the nature of the changes which may be made by a carrier which has exhausted the procedural requirements of the Act.

The same principle was also recognized by the organizations in the proceedings before the District Court in this dispute where it was admitted that "managerial prerogative clauses are quite common in other industries as under the Taft-Hartley law they are recognized." (P.A. 159) In making this admission the organizations perhaps overlooked the fact that this Court has never distinguished between the provisions of the Railway Labor Act and those of the National Labor Relations Act, insofar as they relate to "managerial prerogative clauses." As has heretofore been pointed out, this Court has cited, quoted and relied upon its rulings as to the scope and effect of the Railway Labor Act in reaching its conclusions as to the scope and effect of the National Labor Relations Act. *National Labor Relations Board* v. *American National Insurance Company*, 343 U.S. 395, 402 (1952).

III. THE CARRIERS' PROPOSED RULES WOULD NOT "ABOLISH CRAFT OR CLASS DISTINCTIONS" IN VIOLATION OF ANY OF THE PROVISIONS OF THE RAILWAY LABOR ACT

As heretofore shown (p. 2, *supra*), question numbered 4, stated on page 3 of the petition (now supplemented for the first time by question numbered 3), is not properly involved in these proceedings. This issue was not pleaded, argued, mentioned or referred to by the organizations in the District Court, and the Court of Appeals properly held "This contention comes too late now." (Opinion p. 14, Petition p. 17a)[13] Nevertheless, consideration will be given to the organizations' contentions involving this subject matter, because they were considered by the Court of Appeals and because such contentions are reiterated (and supplemented) in the petition filed with this Court.

1. The organizations' question numbered 3 asks whether a carrier is required to deal with them and follow the procedures of the Railway Labor Act concerning changes in rules relating to job content and crew consist. The organizations' statement of the question and argument is based upon an obvious misconstruction of the position of the carriers and the opinion of the Court of Appeals. No question of bargainability is involved in this case. The carriers

[13] See *McComb* v. *Goldblatt Bros.*, 166 F.2d 387, 389, 390 (C.A. 7, 1948); *Chatos* v. *Midco Oil Corp.*, 152 F.2d 153, 154 (C.A. 7, 1945), cert. den. 329 U.S. 717; *Commercial National Bank* v. *Reber*, 74 F.2d 301, 302 (C.A. 3, 1934); *Atlantic Brewing Company* v. *Brennan Grocery Company*, 79 F.2d 45, 48 (C.A. 8, 1935).

The contention on page 25 of the petition that "the wiping out of crafts or classes was one result of the absence of rules and hence was raised by the amended complaint" is obviously a poorly considered afterthought—although it must be admitted that the point is so lacking in substance that it is not surprising that it did not occur to the many counsel representing the organizations until 37 days after their amended complaint was filed.

have never contended, and the Court of Appeals did not hold, that the carriers are not required by the Act to bargain with their employees with respect to proposed changes in rules involving the assignment of work or the consist of crews. The record shows, and the Court of Appeals did hold, that the carriers have bargained with their employees with respect to such proposed rules changes "for more than 20 years . . . in the light of the great technological improvements in the industry, but such efforts have produced no substantial or meaningful relief." (Opinion, p. 3; Petition, p. 4a).

The record also shows that on November 2, 1959, the carriers proposed rules changes which would give managements the right to exercise some discretion with respect to the assignment of work and the consist of crews. The record further shows, and the Court of Appeals held, that these proposed rules changes were the subject of collective bargaining between the carriers and their employees, were progressed through all the procedures available to the carriers under the Railway Labor Act in their efforts to reach an agreement with the organizations, and that having failed to reach an agreement, the carriers are entitled, under the Railway Labor Act, to make these proposed rules or rules changes effective.

The statement on page 22 of the petition that "the court below was clearly wrong when it adopted as its own the carriers' statement that assignment of work is a subject with which the Railway Labor Act does not deal" will be further considered in the following discussion of petitioners' question numbered 4.

2. The contention that the carriers' proposed rule, which would permit the use of certain train and engine crews to perform (subject to specified conditions) both so-called road

and yard work (P.A. 67), would "abolish crafts and classes" contrary to the provisions of the Railway Labor Act, is based upon a distortion of the meaning of the term "class or craft" as used in the Act.

In the Court of Appeals, the organizations argued that the Act establishes immutable crafts or classes, and thereby prohibits the transfer of work from one to another where such transfers might alter the existing structure.[14] The Court of Appeals in that context held that the Railway Labor Act does not deal with the subject of "assignment of work." The organizations have seized upon this language as a holding by the Court of Appeals that the subject of assignment of work is not one for collective bargaining. The opinion of the Court of Appeals is not subject to this interpretation. It does not deal with bargainability but only responds to the claim that the provisions of the Act, independently of agreement, regulate the manner in which the carriers may assign work.

The organizations further argue that the provisions of the Railway Labor Act establish a substantive right inur-

[14] To the contrary see *Switchmen's Union of North America* v. *National Mediation Board*, 320 U.S. 297 (1943), and *Flight Engineers International Association* v. *National Mediation Board*, 294 F.2d 905 (C.A., D.C., 1961), cert. den., 368 U.S. 956, in which the court said, at page 908,

> "Under the Railway Labor Act, only the National Mediation Board (or the committee designated by it) has the power to make craft or class determinations. *Switchmen's Union of North America* v. *N.M.B.*, 1943, 320 U.S. 297, 64 S.Ct. 95, 88 L.Ed. 61. The right given to employees is that of designating, by a majority of those comprising a 'craft or class', their representatives. See 320 U.S. at Pages 300-301, 64 S.Ct. at Pages 96-97. *It has become well settled that in making 'craft or class' determinations, the National Mediation Board may regroup, amalgamate, or splinter historic bargaining groups, taking into account technological and functional changes, and that the decision of the Board in setting up a 'class' for representation in a jurisdictional dispute is unreviewable by the Courts.*"

ing to those "crafts or classes" now in existence to continue as such, and that any assignment of work by a carrier which might conceivably result in a change or realignment of the existing class or craft structure, is illegal. The only authority offered in support of this contention is the allegation that the Act should be so construed. But that the provisions of the Act do not in fact support the organizations' contention is apparent from the following brief discussion of the sections of the Act cited in the petition:

Section 1, Fifth (45 U.S.C., Sec. 151, Fifth) defines the term "employee" by reference to the orders of the Interstate Commerce Commission under the authority therein delegated to it. Under Section 2, Fourth, of the Act, "employees" are given the right to organize and bargain collectively. If such a grant is to have meaning, employees must first be defined and distinguished from officers. Section 1, Fifth, provides methods for accomplishing these purposes, but also states:

> "That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railroad employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act."

In *Brotherhood of Locomotive Firemen and Enginemen* v. *Interstate Commerce Commission*, 147 F.2d 312 (C.A. D.C., 1945), the court stated that the purpose of Section 1, Fifth is to define and separate employees and subordinate officials from officers. No support for the organizations' position can, therefore, be derived from this Section.

Section 2, Fourth (45 U.S.C., Sec. 152, Fourth) is designed to permit organization and bargaining by the rep-

resentatives of a majority of a "craft or class" and to prohibit the carriers from interfering with the employees' right to organize. To read into this section a substantive definition of what crafts or classes shall be, impinging upon assignment of work by the carriers, defies the plain language used.

Section 3 (45 U.S.C., Sec. 153) establishes the National Railroad Adjustment Board and procedure to be followed by that Board in handling disputes of the so-called minor type. Petitioners refer to the fact that the First Division of the Board is constituted, insofar as labor membership is concerned, of members appointed from the ranks of each of the five major operating labor organizations. They apparently infer that this is a recognition of the immutability of established "crafts or classes." Plainly, this division of the Board is so constituted, as a matter of practicality, to insure adequate representation and does not have any effect on the right of the carriers to assign work.

Certainly "classes or crafts" of employees are to be determined for representation purposes, as illustrated by cited preceding sections of the Act. Such a determination, however, is always subject to change, if for no other reason than by jurisdictional disputes between the employees themselves. However, the fact that "crafts and classes" of employees are determined for this purpose and that the National Railroad Adjustment Board is constituted of members of each of the five operating crafts now in existence cannot be used to support any inference that the Act, in and of itself, limits management as to what work it may assign any employee.

This brief examination of the Railway Labor Act sections relied upon indicates unequivocally that the term

"craft or class" is used in a limited sense. In effect, the Act authorizes the majority of a "craft or class" to select its representatives for the purposes of organization and bargaining. It does not define the term, and authorizes the Mediation Board to determine what is an appropriate "class or craft" when one organization seeks representation rights held by another. The carriers' second promulgation does not touch upon this subject, and does not interfere with organization and bargaining as contemplated in the Act. The promulgation simply gives the carriers the right (since collective bargaining procedures have been exhausted) to determine, for example, the number of trainmen that shall be used in road train crews and of that number, how many are to be conductors, ticket collectors, baggagemen, and brakemen. It likewise gives the carriers the right to use road crews in yard service and yard crews in road service, subject to the limitations provided in the proposed rule.

Clearly, the organizations' real complaint goes to the carriers' assignment of work. As the Court of Appeals properly held, the Railway Labor Act does not deal with that subject.

In their petition for rehearing filed with the Court of Appeals, and in the instant petition before this Court, the organizations seem primarily concerned with the assumption that one organization, namely, the Switchmen's Union of North America, may, in some way, be adversely affected by carriers' proposed rules changes.[15] Even if such an

[15] Both engineers and firemen, whether they work in road or yard service, are represented by the same organizations and have both road and yard seniority rights. Whether they work in road or in yard service depends upon the extent of their seniority and their choice of available assignments. Most road and yard trainmen are represented by the Brotherhood of Railroad Trainmen and many are similarly situated. Obviously, a combination of road and yard service would destroy no craft or class. The relatively few yard

assumption is warranted, which it is not, and even if such an assumption had been raised in the District Court, which it was not, the result would not be a wiping out of the concept of craft or class, but at the most, a realignment of the consist of existing "crafts or classes," a possibility which is contemplated by the Act.

Furthermore, it is not the purpose of the Railway Labor Act to preserve, or foster, or protect any labor organization by guaranteeing to it representation rights of any "class or craft."

CONCLUSION

For the reasons stated and on the authority cited herein, the carriers respectfully request this Honorable Court to deny the petition of the organizations for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit in this cause.

Respectfully submitted,

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trainmen represented by the Switchmen's Union of North America are a "class or craft" only in the sense that they are a splinter group of railroad operating employees represented on a few railroads by that union.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 730

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, BROTHERHOOD OF RAILROAD TRAINMEN, AND SWITCHMEN'S UNION OF NORTH AMERICA, *Petitioners,*

v.

THE BALTIMORE & OHIO RAILROAD, *et al., Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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In this reply brief we shall not answer all the numerous statements in the brief in opposition which are erroneous nor the arguments which petitioners consider unsound, but shall confine ourselves to pointing out the misstatements concerning the factual bases for the decision of the Court of Appeals.

1. The repeated statements in the brief in opposition (pp. 12, 14, 17-19) that the District Court had before it prior to its dismissal of the amended complaint "The facts referred to by the Court of Appeals" (p. 12) or "substantially all" the evidence summarized (p. 18) or "all the material facts" (p. 19), are based on the assumption that these facts were stated to the District Court by counsel for the carriers under circumstances which placed on the labor organizations the burden of introducing evidence or standing bound by all carrier counsel's statements (Br., pp. 14, 17, 18).

The statement of facts by counsel for the carriers was made in support of his first motion to dismiss the original complaint on the ground that the labor organizations had not exhausted their administrative remedies because they had not called a strike which could lead to the appointment of an Emergency Board (P.A. 120; Tr. 7-8, 9, 24-35). This statement of facts was made prior to the issuance of the second promulgation. So when counsel for the carriers stated his willingness to offer witnesses if there was any dispute over any "material" fact or "any matter that is material to this motion" (P.A. 137; Tr. 9-10), the only issue by which to judge materiality was that of exhaustion of remedies, since this was the only issue then before the District Court. There was no conceivable basis on which counsel for the labor organizations had any burden to challenge statements by opposing counsel not material to the exhaustion issue.

Nor is it true as the carriers assert (Br., p. 17) that counsel for the organizations did not question any part of the carriers' statement of facts as not true. Counsel for the labor organizations did take issue with such of the statements of counsel for the carriers as could con-

ceivably have any relevance to the issue of exhaustion of remedies. For instance, counsel for the labor organizations challenged (Tr. 43-44) the carriers' statement that the United States Government was committed to the appointment of an Emergency Board if a strike should be called (Tr. 31-35). Counsel for the labor organizations stated that at the conference to which the carriers referred the representatives of the Government refused to discuss the possibility of an Emergency Board on the ground that the subject was premature (Tr. 43-44). Counsel for the labor organizations also challenged (Tr. 67) the statement of counsel for the carriers (Tr. 21, 59) that the promulgation of July 17, 1962 conformed to the recommendations of the Presidential Railroad Commission.

The District Court overruled the first motion to dismiss the original complaint holding that the suit was not prematurely brought and that the labor organizations had exhusted their administrative remedies (P.A. 127-128). In view of the fact that the District Court agreed with the legal position of the labor organizations on the first motion to dismiss the original complaint, there was even less reason for the labor organizations to call attention to the untruth of each of the misstatements of fact made by counsel for the carriers in the course of his argument in support of the first motion.

2. That counsel for the carriers restated some of the same supposed facts during his argument in opposition to the oral motion of counsel for the labor organizations for leave to file an amended complaint, does not constitute putting these facts before the court on the

motion to dismiss the amended complaint, as the carriers argue (Br., pp. 14, 18). The statement in the carriers' brief in opposition (p. 18) that the District Court, following this recital of supposed facts, "then twice" asked counsel for the labor organizations if they had anything further "to submit" and each time received a negative answer, is completely misleading. In neither instance was the District Court offering counsel for the labor organizations an opportunity to submit evidence on the issue of the sufficiency of the amended complaint.

The first instance to which the carriers refer (Br., p. 18) occurred at the close of the arguments on the motion of the labor organizations for leave to amend the original complaint to attack the validity of the second promulgation. The Court then asked counsel for the labor organizations (P.A. 161; Tr. 136):

> "Mr. Schoene, is there anything else that you have other than the amendment that you have proposed?"

This hardly constituted an offer to receive evidence with respect to an amended complaint when the District Court had not yet allowed the complaint to be amended.

The second instance to which the carriers refer (Br., p. 18) occurred immediately after the District Court had denied leave to amend the complaint (P.A. 161; Tr. 137). The District Court then informed counsel that he would go back to the second motion to dismiss the original complaint, namely, the motion to dismiss as moot due to withdrawal of the first promulgation, and asked if there was "any further response on

that" (P.A. 161-162, Tr. 137). Counsel for the labor organizations replied (P.A. 162; Tr. 137):

> "I think not, if the Court has denied the motion for leave to file the amended complaint."

This can by no stretch of the imagination constitute an offer to receive evidence on an amended complaint which counsel had been denied leave to file.

3. The most crucial facts relied upon by the Court of Appeals in its opinion were never even stated to the District Court by anybody or in any manner prior to the granting of the motion to dismiss the amended complaint. Thus the carriers' brief in opposition (pp. 12, 14, 17-21) is not only in error in claiming that such facts as were stated by counsel for the carriers in his arguments were before the District Court as undisputed evidence but the crucial facts were not even before the District Court as statements of counsel. At no time prior to the granting of the motion to dismiss did counsel for the carriers or anyone else so much as imply that the labor organizations engaged in "sterile discussion" (Pet., p. 15a) or that "resort to collective bargaining" failed "without fault of management" (Pet., p. 15a). The Court of Appeals seems to regard these "facts" as decisive for it speaks of "sterile discussion" as the controlling factor in "placing the carriers in a position to exercise their prerogatives to unilaterally put into effect their proposed changes" (Pet., p. 15a).

4. The repeated statements in the brief in opposition that the facts stated by the Court of Appeals were undisputed (Br., pp. 12, 14, 17-21) are obviously false.

The labor organizations have never, at any time, conceded that they engaged in sterile discussion or frustrated collective bargaining or that bargaining failed through no fault of management. Nor have they ever conceded that they insisted on unreasonable rules or that the rules in question cost the carriers $592,062,000 during 1961 (Pet., p. 6a). No such assertion was ever made prior to the granting of the motion to dismiss, so the labor organizations had no opportunity to put such assertions in issue. Not until the opinion of the Court of Appeals was handed down were the labor organizations ever put on notice that such disputed contentions of fact were deemed relevant to the question of whether the amended complaint states a claim upon which relief may be granted. They at once filed a petition for rehearing disputing the basis for any such findings of fact (Pet. for Reh., pp. 5-7).

5. The statement of the case set forth in the brief in opposition (pp. 3-11) constitutes merely the carriers' version of the facts, a version not supported by the amended complaint, and hence is not properly before this Court. Almost the entire Statement of the Case in the carriers' brief in opposition consists of supposed facts not asserted even by carrier counsel until after the amended complaint had been dismissed for failure to state a cause of action.

6. The carriers' assertion that it has never been disputed or denied by the labor organizations that the carriers have complied with all the procedural requirements of the Railway Labor Act (Br., p. 22, n. 10) is not true. The main point of the amended complaint is that the procedural provisions of the Railway Labor Act, as well as its substantive provisions, require notice

and processing of the specific standards as to rules and working conditions proposed by a carrier, which is the requirement the carriers seek to avoid. In addition, while we do not believe the evidence introduced during the hearing on the motion for injunction pending appeal should properly be considered as bearing on the question whether the amended complaint states a cause of action, if it is considered, there was conflicting testimony as to what negotiations, if any, had ever taken place on the November 2, 1960 notices (No. 13855, P.A. 6, 34).

7. The carriers' assertion (Br., pp. 36-37, n. 15) that "the relatively few yard trainmen represented by the Switchmen's Union of North America are a 'class or craft' only in the sense that they are a splinter group of railroad operating employees represented on a few railroads by that union" is untrue. On every railroad in the country the National Mediation Board treats yard foremen, helpers, and switchtenders as a separate craft or class. See 6th column of Table 10 at pp. 88-90 of the Twenty Seventh Annual Report of the National Mediation Board (G.P.O., 1961). As is apparent from the cited table, the Switchmen's Union of North America represents this craft or class on many important railroads. For decisions of the National Mediation Board holding that this is a distinct craft or class see *Spokane, Portland & Seattle Ry.*, 3 N.M.B. Determinations 159, 164 (1954); *Akron, Canton & Youngstown Ry. Co.*, 1 N.M.B. Determinations 126, 129 (1938); *New York Central Railroad Co.*, 1 N.M.B. Determinations 197, 209 (1941).

CONCLUSION

Each question presented is of great public importance and requires decision by this Court.

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